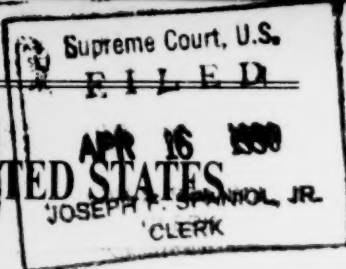


89-1602
No.



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, AFL-CIO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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QUESTIONS PRESENTED

1. Whether contested District Court orders — purportedly “interpreting” a consent decree — that require a labor union, on pain of contempt, to publish speech with which it disagrees and to submit to outside interference in hundreds of union elections are appealable either as final decisions under 28 U.S.C. § 1291 or as interlocutory injunctive orders under 28 U.S.C. § 1292(a)(1).

2. Whether a Court of Appeals may lawfully refuse to consider an appeal properly within its jurisdiction.

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IN THE
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OCTOBER TERM, 1989

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
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Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the "IBT") petitions for issuance of a writ of certiorari to review two orders of the United States Court of Appeals for the Second Circuit summarily dismissing appeals from District Court orders purporting to interpret an IBT consent decree.

OPINIONS BELOW

The orders of the Court of Appeals (App. 1a, and 2a)¹ are

1. References to the District Court record are cited as "D.Ct.R." followed by the docket number. References to the Court of Appeals record are cited as

unreported. The Memorandum and Order of the United States District Court for the Southern District of New York (App. 3a-18a) is reported at 723 F. Supp. 203. The District Court's Order of October 18, 1989 (App. 19a-20a) and its Order of November 16, 1989 (App. 21a-25a) are unreported.

JURISDICTION

The orders of the Court of Appeals were entered on December 13, 1989. Petitioner's timely petition for rehearing was denied on February 12, 1990. (App. 26a-27a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

28 U.S.C. § 1291 provides in pertinent part:

The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States

28 U.S.C. § 1292(a)(1) provides in pertinent part:

"Ct.A.R." References to the Appendix of the petition are cited as "App." followed by the page number and the lower-case "a" ("App. ____a").

[T]he courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions

STATEMENT

Petitioner is the largest labor union in North America, with approximately 1.5 million members and some 650 affiliated local unions in the United States and Canada.² The Orders appealed from below purported to interpret and implement the terms of a consent decree, entered into by the IBT and the United States, in settlement of civil litigation. In its appeals, the IBT argued that the District Court's orders in fact unilaterally revised the consent decree, impermissibly burdened the IBT's First Amendment right to control the content of its own union magazine, and usurped the IBT's lawful authority to conduct union elections free from unwarranted external interference.

The government moved to dismiss the appeals on the ground that rulings purporting to interpret a consent decree are not "final" orders under 28 U.S.C. § 1291, and that the rulings in this case, even though they directed the IBT to take specific actions, were not appealable "interlocutory" injunctive orders under 28 U.S.C. § 1292(a)(1). The government also argued that the issues presented by the IBT's appeals were so insubstantial that the Court should refuse to hear the appeals even if they properly invoked the Court's jurisdiction.

2. Ct.A.R., Affidavit ("Aff.") of James T. Grady, sworn to Nov. 16, 1989 ("Nov. 16 Grady Aff.") ¶ 8.

After oral argument, the Court of Appeals granted the motions to dismiss without opinion. This renunciation of jurisdiction over an entire class of appealable District Court rulings is contrary to the settled precedents of this Court and is in clear conflict with the law in several other circuits. By refusing to hear the IBT's appeals, the Second Circuit has effectively abdicated its responsibility to review the exercise of judicial power by District Courts before whom consent decrees have been entered.

This Court should grant a writ of certiorari to correct this error, and to resolve two issues of continuing importance — under what circumstances may a Court of Appeals refuse to review a District Court decision which either interprets or departs from the terms of a consent decree, and whether the Courts of Appeals may decline to exercise their mandatory jurisdiction by summarily dismissing appeals which properly invoke the Court's jurisdiction.

A. Proceedings in the District Court

In June 1988, the United States commenced a civil RICO action against the IBT and numerous individual defendants, alleging that various members and affiliates of the IBT had engaged in illegal activity. The action was settled in March 1989 by a Consent Order (App. 28a-56a) which provided, among other things, for the appointment of three officers — an Independent Administrator, an Investigations Officer and an Election Officer — who were to “oversee certain operations of the IBT as described herein.” (App. 33a ¶ 12). Several months after the Consent Order was signed, disputes arose as to the meaning of certain of its terms and the scope of the court officers' duties. In the course of adjudicating these disputes, the District Court issued the October 18 and November 16 orders, which not only authorized the court-appointed officers to interfere in local union elections despite the Consent Order's clear

language to the contrary, but also *sua sponte* directed the IBT to publish speech with which it disagreed.

1. The October 18 Orders: Interference with the Right of Free Elections

Under the Consent Order, the Election Officer was given authority to "supervise the IBT election . . . to be conducted in 1991." (App. 41a). While the Consent Order, by its clear and unqualified terms, thus confines the Election Officer's supervision to the single "election" of the "IBT" (*i.e.*, the International union and its officers) "in 1991," the Election Officer construed the Order as authorizing him to conduct the entire "election process" preceding the 1991 election, including the 650 local union elections — many of them to be held in 1990 — in which, among other things, delegates would be elected to nominate candidates for the 1991 election.

Accordingly, the Election Officer submitted a "Draft Timetable" to the IBT in which he proposed to assume broad powers beyond those specified in the Consent Order. This included not only the conduct of these local elections but also the promulgation of election rules overriding the IBT Constitution and the constitutions and bylaws of the autonomous IBT affiliates.³ Moreover, as the Election Officer acknowledged, his scheme would require the hiring of approximately 1,800 *per diem* workers to conduct delegate elections at the 650 IBT locals, none of which locals was a party to the RICO action culminating in the Consent Order.⁴ The IBT's

3. D.Ct.R. 538, Aff. of Michael H. Holland (the Election Officer), sworn to Sept. 27, 1989 ("Holland Aff.") ¶¶ 4, 9, 15 and Exhibit ("Ex.") E, G annexed thereto.

4. See D.Ct.R. 542, Aff. of James T. Grady, Esq., sworn to Oct. 11, 1989 ("Oct. 11 Grady Aff.") ¶¶ 12-13; see also D.Ct.R. 538, Holland Aff. ¶¶ 4, 9,

undisputed proof showed that the Election Officer's proposed activities would cost the IBT over \$3.8 million⁵ and that an expense of that magnitude was never discussed in the settlement negotiations.⁶

When the IBT objected to this gross expansion of the Election Officer's powers under the Consent Order, the Independent Administrator (who is empowered under the Consent Order to apply to the District Court in case of controversies) filed an application seeking court approval of the Election Officer's Draft Timetable. The IBT opposed the application and filed a cross-application seeking to enjoin the Election Officer from exercising powers beyond those specified in the Consent Order. In support of its position, the IBT submitted detailed affidavits from the primary IBT negotiators of the Consent Order attesting to the parties' intention *not* to include the local union delegate elections or rulemaking within the Election Officer's purview, and annexing prior drafts of the Consent Order showing that all provisions which would have conferred such powers upon the Election Officer had been omitted from the final version of the Consent Order.⁷ In response, the government (in support of the Independent Administrator) submitted only a brief and wholly conclusory

and Ex. E annexed thereto.

5. See Ct.A.R., Nov. 16 Grady Aff. ¶¶ 24-26; D.Ct.R., Oct. 11 Grady Aff. ¶¶ 15-16; D.Ct.R. 546, Aff. of Richard C. Bell, sworn to Oct. 10, 1989 ("Bell Aff.") and Ex. A annexed thereto.

6. See Ct.A.R., Nov. 16 Grady Aff., ¶¶ 16-17; D.Ct.R. 542, Oct. 11 Grady Aff. ¶¶ 14, 27-31, 34; D.Ct.R. 545, Aff. of William A. Roberts, Esq., sworn to Sept. 26, 1989 ("Roberts Aff."); D.Ct.R. 544, Aff. of G. William Baab, sworn to Sept 29, 1989 ("Baab Aff.").

7. D.Ct.R. 542, Oct. 11 Grady Aff. ¶¶ 25-29, 34-35 and Appendix A thereto; D.Ct.R. 545, Roberts Aff. ¶¶ 3-5; D.Ct.R. 544, Baab Aff. ¶¶ 4-7.

"sworn *amicus* letter" from one of its negotiators.⁸

Notwithstanding all this, the District Court granted the Administrator's application in its entirety and denied the IBT's cross-application. (App. 3a-18a). While acknowledging that the parties had submitted directly contradictory sworn statements on the intended scope of the Consent Order, the District Court nonetheless denied the IBT's request for an evidentiary hearing (App. 10a)⁹ and instead adopted as a matter of law an interpretation of the Consent Order based on its own view of the "spirit and intent" of that document. (App. 8a, 10a, 12a, 16a, 18a).¹⁰

8. D.Ct.R. 555, Letter from Assistant United States Attorney Randy M. Mastro to Hon. David N. Edelstein, sworn to Oct. 12, 1989.

9. See also D.Ct.R. 617, transcript of proceedings, Oct. 13, 1989, at 25-26.

10. The District Court's decision to use the consent decree as a vehicle to develop what it regards as desirable policy for the IBT is utterly incompatible with this Court's teaching on this subject, a fact which makes the need for appellate review especially acute. See, e.g., *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971):

[A consent decree] normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.

(footnote omitted, emphasis in original). See also *Local Number 93, International Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 522 (1986) ("[I]t is the agreement of the parties, rather than the force of the law upon

Among other things, the District Court held that the Election Officer's authority under the Consent Decree to "supervise the IBT election . . . to be conducted in 1991" extended to the 650 local union delegate elections to be held beginning in 1990. The Court further granted the Election Officer "the right to promulgate electoral rules" contravening the constitutions and bylaws of the IBT and its local affiliates (the provisions of which were expressly protected under ¶ 18 of the Consent Order), and approved the Election Officer's Draft Timetable, pursuant to which the Election Officer has already begun to exercise these expanded powers, including the promulgation of proposed rules governing delegate elections. (App. 9a-11a).

The District Court also approved the Election Officer's fee application (App. 13a-14a), requiring the IBT to pay for expenses incurred in preparing a survey of local unions, an activity *expressly conceded* by the Election Officer to be *ultra vires* under the Consent Order (App. 11a-12a);¹¹ created a new \$100,000 reimbursement fund (App. 14a-16a, 19a-20a) in place of the reimbursement procedure specified in the Consent Order (App. 43a, ¶ 12(H)); and ruled, *sua sponte*, that the IBT would henceforth have only three days to object to the expense and fee applications of the court-appointed officers (App. 16a), instead of the fourteen days specified in the Consent Order. (App. 43a ¶ 12(H)). In each of these respects, the District Court imposed conditions "pursuant" to a consent decree that were nowhere present in the decree and, indeed, were flatly contrary to its terms.

which the complaint was originally based, that creates the obligations embodied in a consent decree.").

11. See D.Ct.R. 538, Holland Aff. ¶ 17.

The District Court denied the IBT's request for certification, pursuant to 28 U.S.C. § 1292(b), and refused to stay the effect of its ruling pending appeal.¹²

2. The November 16 Order: Interference with Free Speech

The District Court's November 16 order originated in a conflict over the interpretation of paragraph 12(E) of the Consent Order (App. 42a), which empowers the Administrator "to distribute materials at reasonable times to the membership of the IBT about the Administrator's activities," with the "reasonable cost" of the distribution to be borne by the IBT. As part of the same provision, the Administrator is also permitted "to publish a report in each issue of the *International Teamster* [the IBT magazine] concerning the activities of the Administrator, Investigations Officer and Election Officer." The Consent Order does not require the IBT to adhere to any particular publication schedule.

From early 1989, even before entry of the Consent Order, the IBT was running a substantial deficit (in large part because of the extraordinary expenses associated with this case) and undertook consideration of various cost-cutting measures, including changing the *International Teamster* from a monthly to a quarterly publication, as had been done in earlier periods of fiscal restraint.¹³ When the Administrator was informed of this possibility in the Fall of 1989, he interpreted it as an effort to curtail his reports to the union membership, and filed an

12. D.Ct.R. 586, *United States v. International Brotherhood of Teamsters*, 728 F. Supp. 920 (S.D.N.Y. 1989).

13. D.Ct.R. 580, Aff. of F.C. Duke Zeller, sworn to Nov. 7, 1989 ("Zeller Aff.") ¶¶ 4-5; D.Ct.R. 579, Aff. of IBT General President William J. McCarthy, sworn to Nov. 7, 1989, ¶ 3.

application with the District Court in which he sought to depose various IBT officers concerning their reasons for changing the publication schedule. The application also sought an order requiring the IBT to continue publishing its magazine monthly.

The IBT responded with detailed affidavits showing that the proposed reduced publication schedule had been under consideration for months, that its sole purpose was to reduce expenses, and that it would save the membership some \$3.5 million annually.¹⁴ While less expensive alternative means for distributing the Administrator's report on a monthly basis were available, the only one accepted by the Administrator — a first-class mailing of his report to all 1.5 million IBT members — would have cost the union some \$5.6 million per year, more than cancelling any savings from quarterly publication of the magazine.¹⁵ No evidence was ever introduced to rebut the IBT's affidavits; indeed, neither the government nor the Administrator submitted *any* evidence at all on the Administrator's application.

Nonetheless, the District Court, once again without benefit of an evidentiary hearing, directed the IBT to publish the Administrator's report monthly, either in the *International Teamster* or by direct mailing, regardless of cost. (App. 24a ¶ 3). The District Court specified where the report was to be placed within the magazine and how it was to be referred to in the table of contents. (App. 25a ¶ 5). Having thus prevailed without having to submit any proof, the Administrator withdrew his original request for depositions.¹⁶

14. D.Ct.R. 580, Zeller Aff. ¶¶ 7-8; D.Ct.R. 581, Aff. of James T. Grady, sworn to Nov 7, 1989 ("Nov. 7 Grady Aff.") ¶¶ 4, 7.

15. D.Ct.R. 580, Zeller Aff. ¶ 11; D.Ct.R. 581, Nov. 7 Grady Aff. ¶ 7.

16. App. 25a ¶ 7; Ct.A.R., Aff. of Jed S. Rakoff, sworn to Nov. 22, 1989,

But the District Court went even further. Without application, argument, evidence, or authority, the District Court, *sua sponte*, ordered the IBT to distribute to all 1.5 million IBT members, at IBT expense, each and every one of the District Court's lengthy legal opinions in this case, past and future, "without commentary, embellishment or editing." (App. 24a ¶ 2).¹⁷ The Court rejected the IBT's suggestion that the Court's franking privilege be used to mitigate this new burden.¹⁸

The District Court refused to grant a stay of any aspect of its order.¹⁹

and Ex. I, J ¶ 5 annexed thereto.

17. These opinions account for 15 of 32 pages in the December issue of *International Teamster*, not including the Administrator's report, which is another 3 pages. In the January issue, these opinions account for 7 of 32 pages, and in the February issue 15 of 32 pages (again, in each instance, not including the Administrator's reports of 4 and 2 pages respectively).

By Memorandum and Order dated February 27, 1990, the District Court denied the IBT's request to limit publication to those rulings the Court specifically designated for publication (thereby omitting such routine procedural matters as discovery and scheduling orders of no conceivable interest to the IBT membership), and to publish only the Court's actual rulings, rather than the entire opinions. D.Ct.R. 835, *United States v. International Brotherhood of Teamsters*, No. 88 Civ. 4486 (DNE) (S.D.N.Y. Feb. 27, 1990) at 8-10. The District Court reiterated that "[a]ll orders are to be published in full. It would seem impossible to further clarify such a command." *Id.* at 8-9. The Court did, however, qualify its November 16 order to permit the IBT to comment on the opinions, provided this was done elsewhere in the magazine. *Id.* at 10.

18. D.Ct.R. 754, transcript of proceedings, Nov. 13, 1989, at 40-41.

19. D.Ct.R. 753, transcript of proceedings, Nov. 15, 1989, at 10-14, 17.

B. Proceedings in the Court of Appeals

The IBT promptly appealed both the October 18 and November 16 orders. The government moved to dismiss the appeals, arguing that the District Court's wholesale revision of the Consent Order, its arrogation of editorial control of the *International Teamster*, and its extension of the powers of the Election Officer to the 650 non-party local unions, were embodied in "non-final orders." According to the government, these orders could not be appealed except upon final completion of the various steps mandated by the Consent Order — *i.e.*, in 1992 or later, when the "final judgment" dismissing the case would officially be entered on consent — or possibly by contempt.²⁰ Since all 650 elections will have been held before 1992 and all the District Court opinions prior thereto will have been published, and since the "final judgment" contemplated by the Consent Order can, by the terms of that Order, only be entered on consent, this was tantamount to denying the IBT any appeal whatever. Alternatively, the government argued that the IBT's claims on appeal raised issues that were so insubstantial that the Court of Appeals should simply refuse to hear the appeals even if they properly invoked that Court's jurisdiction.²¹

After brief oral argument, the Court of Appeals granted the government's motion to dismiss the IBT's appeals. (App. 1a, 2a). The Court issued no opinion and gave no reasons for its action. By refusing to hear the appeals, the Court of Appeals permanently deprived the IBT of any effective

20. Ct.A.R., Government's Memorandum of Law, dated Nov. 22, 1989, at 3, 6, 7; Ct.A.R., Government's Memorandum of Law, dated Dec. 1, 1989, at n.3, n.11.

21. Ct.A.R., Government's Memorandum of Law, dated Nov. 22, 1989, at 8-10; Ct.A.R., Government's Memorandum of Law, dated Dec. 1, 1989, at 8-10.

appellate review of the District Court's violations of the IBT's rights to free speech and self-governance and of the District Court's unilateral alterations and modifications of the Consent Order.

The Court of Appeals denied the IBT's timely petition for rehearing and suggestion for hearing *en banc*. (App. 26a-27a).

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS HAS JURISDICTION TO REVIEW THE DISTRICT COURT'S ORDERS

"There can be no serious doubt concerning . . . [this Court's] power to review a court of appeals' decision to dismiss for lack of jurisdiction — a power . . . [it has] exercised routinely." *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n. 23 (1982), citing *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978). The Court should exercise this power here, for otherwise there will never be any appellate review of the issues determined by the District Court, and that Court will be the first, final, and only arbiter of how the 1.5 million IBT members should elect their officers and of what the IBT must say in its communications with its rank and file.

A consent decree can be a valuable and effective vehicle for resolving complex government litigation. Parties are less likely to enter into such consensual arrangements, however, if they must thereby subject themselves to the absolute and unreviewable power of a District Court to "interpret" the decree and to issue orders, backed by the power of contempt, requiring parties to take specific actions not provided for by the terms of the decree itself. While we do not contend that *every* ruling

construing the terms of a consent decree is invariably entitled to appellate review, the Second Circuit has apparently concluded that it lacks the power to review *any* such order. This case — where the orders appealed from so seriously infringe constitutional and statutory rights, where they raise on their face a substantial question of whether the District Court acted wholly outside the terms of the decree, and where they finally dispose of disputes under the decree and compel a specific course of conduct by the parties — is the proper occasion for this Court to make clear that the Courts of Appeals do have and must exercise such power.

A. The District Court's Orders Are "Final Decisions" Under 28 U.S.C. § 1291

1. The Orders Satisfy the Finality Requirement

The requirement that a decision be final before a right of appeal attaches has a venerable history in federal practice, first appearing in the Judiciary Act of 1789.²² This Court has long followed a "pragmatic approach to the question of finality," *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962), and a "practical rather than a technical construction" of the finality requirement. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).²³

Consistent with this approach, the Courts of Appeals have regularly reviewed District Court orders interpreting consent decrees without entertaining the slightest doubt as to the appealability of such orders. *See, e.g., United States v. Western*

22. Section 22, 1 Stat. 84, in its present form, 28 U.S.C. § 1291.

23. *See also Richardson v. United States*, 468 U.S. 317, 322 (1984); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974); *Gillespie v. United States*, 379 U.S. 148, 152 (1964).

Electric Co., 894 F.2d 1387 (D.C. Cir. 1990); *United States v. Board of Education of Chicago*, 799 F.2d 281 (7th Cir. 1986); *Sealy Mattress Co. of Michigan, Inc. v. Sealy, Inc.*, 789 F.2d 582 (7th Cir. 1986); *South v. Rowe*, 759 F.2d 610 (7th Cir. 1985); *White v. Roughton*, 689 F.2d 118 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983); *Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885 (9th Cir. 1982); *Fox v. United States Dep't of Housing and Urban Development*, 680 F.2d 315 (3d Cir. 1982); *Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981); *United States v. Motor Vehicle Manufacturers Ass'n of the United States, Inc.*, 643 F.2d 644 (9th Cir. 1981); *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 626 F.2d 95 (9th Cir. 1980), *cert. denied*, 449 U.S. 1079 (1981); *United States v. Northern Colorado Water Conservancy District*, 608 F.2d 422 (10th Cir. 1979); *Robinson v. Vollert*, 602 F.2d 87 (5th Cir. 1979); *Eaton v. Courtaulds of North America, Inc.*, 578 F.2d 87 (5th Cir. 1978).²⁴

24. Prior to the summary dismissal of the IBT's appeals in this case, the Second Circuit had also acknowledged the appealability of orders interpreting consent decrees. *See, e.g., In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139 (2d Cir. 1987), *cert. denied*, 484 U.S. 953 (1987); *Janus Films, Inc. v. Miller*, 801 F.2d 578 (2d Cir. 1986); *Sanchez v. Maher*, 560 F.2d 1105 (2d Cir. 1977); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 596 F.2d 27 (2d Cir.), *cert. denied*, 444 U.S. 836 (1979). While the issue of appealability "has generally been passed over without comment" in these cases and in the decisions cited in the text, *supra*, as this Court observed in *Brown Shoe* an "exercise of judicial authority assumed to be proper" for many years cannot be disregarded. 370 U.S. at 307. The most recent opinion in the *Western Electric* litigation, decided April 3, 1990, is an excellent example of this point. In *United States v. Western Electric Co.*, No. 87-5388 (D.C. Cir. Apr. 3, 1990) (WESTLAW, CTADC database), the D.C. Circuit observed that it has "repeatedly held that the construction of a consent decree . . . is subject to de novo appellate review." *Id.* at 23. Indeed, the appealability of District Court decisions interpreting a consent decree was so taken for granted by the D.C. Circuit that it discussed, in this context, only the

In decisions where the appealability issue has been more directly addressed, courts other than the Second Circuit have uniformly recognized the right to appellate review. *See, e.g., United States v. Western Electric Co., Inc.*, 777 F.2d 23, 27 (D.C. Cir. 1985) (district court order granting or denying request for waiver of consent decree's restrictions "is subject to appeal as a final decision" under section 1291); *United States v. Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1082 (3d Cir. 1987) (district court order modifying consent decree is reviewable); *Plymouth Mutual Life Ins. Co. v. Illinois Mid-Continent Life Ins. Co.*, 378 F.2d 389 (3d Cir. 1967) (district court order affecting substantial right for which party bargained in agreeing to settlement is immediately reviewable).

The Second Circuit's refusal to hear the IBT's appeals is completely at odds with this substantial body of case law. Moreover, the summary nature of the dismissals indicates an attitude toward the availability of appellate review profoundly inconsistent with the "pragmatic" or "practical" approach repeatedly endorsed by this Court and other circuits. Under that approach, the significant indicia of finality associated with the orders at issue here qualify them as appealable under section 1291.

First, the belief that appellate review should await a later, more "final," stage in this case cannot be indulged here. For all practical purposes, the Consent Order ended the underlying lawsuit. While (as is typical of consent decrees) the final judgment officially terminating the lawsuit is not to be entered until completion of the executory provisions in 1992, the Consent Order permits no further litigation except as may be necessary to enforce the Consent Order. Hence, review of the District Court's orders cannot be postponed to the "end" of the

issue of the standard of review that should apply in such appeals.

litigation, for that point has already been reached. Viewed from this perspective, the orders at issue could not be more final.

Second, the orders appealed from were not merely confirmatory of the settlement, nor were they provisional or tentative in nature. On the contrary, the rulings significantly modified the Consent Order in numerous ways, definitively ruling on the rights and obligations of the parties to the Consent Order. For instance, the orders extended the Election Officer's authority from the "IBT election . . . to be conducted in 1991" to the 650 local delegate elections beginning in 1990, and it required the IBT to publish all the District Court's opinions in full, despite the utter absence of any such requirement in the Consent Order. The District Court itself acknowledged that by establishing the \$100,000 fund for the court-appointed officers, it had "alter[ed] some funding mechanisms" under the Consent Order and had created a "revision" of the decree. (App. 15a, 16a).

When a District Court order modifies a consent decree to such an extent, and when the modification arises from a context where the indicia of finality are so clear, the exercise of appellate review is required. The Second Circuit, however, ignored the approach toward the issue of finality endorsed by this Court and other circuits, and in doing so misapplied the "doctrine of finality . . . [to deny the IBT] any appellate review." *Cobbledick v. United States*, 309 U.S. 323, 328-29 (1940).

2. The Orders Are Appealable Under the Collateral Order Doctrine

An appellate court has jurisdiction to review a District Court decision under the collateral order doctrine, if the decision (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468

(1978); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). Because the orders appealed from in this case so clearly satisfy the requirements of the collateral order doctrine, the Second Circuit's dismissals of the appeals can only be understood as the product of the Court's erroneous view of its appellate jurisdiction.

As to the first requirement, the District Court's orders conclusively determined both the scope of the Election Officer's authority and the IBT's obligation to publish the District Court's opinions in full. The District Court acknowledged that the October 18 Memorandum Decision and Order "settles a large number of matters relating to the Consent Decree." (App. 17a). The Court also instructed the IBT that the November 16 order was final and that any further arguments should be addressed to the Court of Appeals.²⁵ The District Court orders were thus "made with the expectation that they . . . [would] be the final word on the subject addressed." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 12-13 n. 14 (1983).

As to the second requirement, the District Court's rulings resolved important issues separate from the merits of the underlying RICO action, viz: the proper construction of the Consent Order that settled the underlying action; the District Court's authority — or lack thereof — to revise the decree; the District Court's power — or lack thereof — to interfere in the election process of local unions that were not parties to the lawsuit; and the constitutionality of court orders dictating the content, coverage, layout and publication schedule of a union magazine.

Finally, the District Court orders were, and remain, effectively unreviewable on appeal from a final judgment

25. D.Ct.R. 753, transcript of proceedings, Nov. 15, 1989, at 5, 11, 13-14.

because there can be no appeal from the final judgment in this case. The only "final judgment" possible under the Consent Order is a dismissal with prejudice upon consent of the parties, after the settlement has been carried out and there is no case or controversy left for any court to review. (App. 29a ¶ 2). Moreover, the Consent Order contemplates that that final judgment will be entered, at the earliest, in 1992, well after the completion of the 650 local elections and after dozens of issues of the judicially shaped *International Teamster* will have been issued.

This Court, and the Courts of Appeals, have consistently interpreted the collateral order doctrine to permit appellate review of orders no more final than those which the Second Circuit refused to review in this case. *See, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (appeal from an order requiring defendant to pay cost of class notification); *Roberts v. United States District Court*, 339 U.S. 844 (1950) (appeal from order denying leave to proceed *in forma pauperis*); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984) (appeal from an order permitting disclosure of litigation report over claim of privilege). The same result is dictated here.

B. Orders Infringing First Amendment Rights Require Immediate Appellate Review

It is settled that state action which constitutes an infringement on protected First Amendment rights is subject to immediate appellate review. *National Socialist Party of America v. Skokie*, 432 U.S. 43, 44 (1977). Although the District Court orders in this case clearly burdened the IBT's First Amendment rights, the Second Circuit ignored the impact of this constitutional infringement when it considered the appealability of the IBT's claims.

Specifically, the November 16 order, by forcing the IBT to publish the District Court's opinions, requires the IBT to publish speech with which it disagrees — an immediate and continuing encroachment upon the IBT's freedom of expression that causes irreparable harm each time the IBT publishes the magazine through which it communicates with its membership. *See National Socialist Party of America v. Skokie*, 432 U.S. at 44 (immediate appeal necessary because ongoing infringement of First Amendment rights amounts to irreparable harm); *see also Elrod v. Burns*, 427 U.S. 347, 374–75 (1976) (“loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”).

The need for an immediate appeal from the October 18 orders is just as critical. Those orders empower the Election Officer to determine the rules and conditions of 650 local union delegate elections. The postponement of review of those orders until some theoretically more “final” stage of the case would render review meaningless, for the elections will already have been held when that point is reached. Because the October 18 orders violate the IBT members' First Amendment rights to elect their own leadership free from government intrusion, *see Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 5–6 (1964), and because such right would be “‘irretrievably lost’ absent an immediate appeal,” *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988), quoting *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985), those orders, too, were immediately appealable under *National Socialist Party of America v. Skokie*.

**C. The District Court's Orders Are Appealable as
Interlocutory Injunctive Orders Under 28 U.S.C.
§ 1292(a)(1)**

The Courts of Appeals have jurisdiction to hear appeals from “[i]nterlocutory orders of the district courts of the United States, . . . granting, continuing, modifying, refusing or

dissolving injunctions" 28 U.S.C. § 1292(a)(1). Construing this grant of jurisdiction, this Court has held that even if an order is non-final, it is appealable if it might have a "serious, perhaps irreparable, consequence," and . . . [if] the order can be 'effectually challenged' only by immediate appeal" *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981), quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955).

In circuits other than the Second, the availability of appellate review of orders interpreting consent decrees has been recognized, even when the orders are regarded as interlocutory. See, e.g., *United States v. Western Electric Co., Inc.*, 777 F.2d 23, 29 (D.C. Cir. 1985) (district court decision to "allow, or refuse to allow, a course of conduct under the consent decree . . . would be reviewable"); *Sperry Corp. v. Minneapolis*, 680 F.2d 1234, 1236-37 (8th Cir. 1982) (same); *Roberts v. St. Regis Paper Co.*, 653 F.2d 166, 170 (5th Cir. 1981) (ruling on construction of consent decree is reviewable). The Second Circuit's refusal to review the orders in this case is contrary to this Court's interpretation of section 1292(a)(1) in *Carson*, and in conflict with other circuits which have recognized the appealability of such orders.

There can be no doubt that the orders at issue in this case meet the *Carson* standard. The November 16 order directing the IBT to distribute the District Court's opinions "in full, within 30 days, to the IBT membership as a whole without commentary, embellishment or editing" constitutes a mandatory injunction.²⁶ The Administrator himself characterized the

26. Injunctions are "orders that are directed to a party, enforceable by contempt, and designed to accord or protect, 'some or all of the substantive relief sought by a complaint' in more than preliminary fashion." 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3922, at 29 (1977)(footnote omitted), quoting *International Products*

application that precipitated this order as "akin to an application for preliminary injunction."²⁷ The October 18 orders likewise constitute the refusal of an injunction. In granting the Election Officer the expanded powers he had requested in his application, the District Court denied the IBT's cross-application for an order precluding the Election Officer from engaging in his proposed *ultra vires* activities, and thereby refused an application for injunctive relief.

The District Court orders may also be regarded as a modification of a prior injunction. Because the Consent Order contains provisions for prospective injunctive relief,²⁸ it constitutes an "injunction" under section 1292(a)(1). See *Carson v. American Brands, Inc.*, 450 U.S. 79, 83-84, n. 9 (1981); *Durrett v. Housing Authority of Providence*, No. 89-1608 (1st Cir. Feb. 14, 1990) (LEXIS, Genfed library, U.S.App. file); *Thompson v. Enomoto*, 815 F.2d 1323, 1326 (9th Cir. 1987); *Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 1983). As in *Carson*, "prospective relief . . . [is] at the very core" of the Consent Order in this case. 450 U.S. at 84. The District Court's modification of the Consent Order has "serious, perhaps irreparable consequence[s]" and can be "effectually challenged" only by immediate appeal²⁹ *Id.*, quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 178, 181 (1955). Not only do the orders violate the IBT's First Amendment rights of free speech and free elections, but also they deprive the IBT of the benefit of the bargain it struck in exchange for waiving its due process right to trial. See *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 233-37 (1975); *United States v. Armour & Co.*, 402 U.S. 673, 681-82

Corp. v. Koons, 325 F.2d 403, 406 (2d Cir. 1963).

27. D.Ct.R. 754, transcript of proceedings, Nov. 13, 1989, at 45.

28. See App. 32a-48a.

(1971); *Securities and Exchange Comm'n v. Levine*, 881 F.2d 1165, 1178-79, 1181 (2d Cir. 1989).

Moreover, the District Court's forced publication of its opinions and orders in the *International Teamster* is a "serious, perhaps irreparable consequence" in that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 374-75 (1976), citing *New York Times Co. v. United States*, 403 U.S. 713 (1971). Lastly, the District Court's orders can be "effectually challenged" only by immediate appeal because there will be no later opportunity for appeal. The only "final judgment" that will be entered in this case will be a dismissal on consent of the parties after the Consent Order has been fully implemented. (App. 29a ¶ 2).

II.

A COURT OF APPEALS MAY NOT REFUSE TO HEAR CASES WITHIN ITS MANDATORY JURISDICTION

The government's alternative suggestion below that the Second Circuit dismiss the appeal as "insubstantial," whether or not the Court had jurisdiction, is not so much a legal argument as an invitation to ignore the law. The jurisdiction of the Courts of Appeals is mandatory, not discretionary: 28 U.S.C. § 1291 provides that the Courts of Appeals "shall" have jurisdiction of appeals from all final decisions of the District Courts, and 28 U.S.C. § 1292(a)(1) provides that the Courts of Appeals "shall" have jurisdiction of appeals from interlocutory orders granting, continuing, modifying or dissolving injunctions.

This Court has repeatedly made clear on many occasions that the lower federal courts "lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Public Service, Inc. v. Council of New Orleans*, 109

S.Ct. 2506, 2512 (1989); *see also Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . ."). As the Court observed long ago, speaking through Chief Justice Marshall, the federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Yet that is precisely what the Second Circuit did in this case, if the summary orders of dismissal represent acceptance of the government's alternative ground for dismissing the IBT's appeals.

The government sought to justify this position in the Court of Appeals by characterizing its proposal as a mere "extension" of the principle that "the federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit . . .'" *Hagans v. Lavine*, 415 U.S. 528, 536 (1974), quoting *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579 (1904).²⁹ Even assuming this doctrine were applicable to appellate jurisdiction (as opposed to the subject matter jurisdiction of the District Courts), it could not support the dismissal of the IBT's appeals.

Dismissal for insubstantiality is proper only where "the constitutional issue presented is essentially fictitious," so that there is no genuine federal question before the court and therefore the court is effectively deprived of federal subject matter jurisdiction. *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *accord Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 666 (1974) (test is whether right claimed is "so insubstantial, implausible, foreclosed by prior decisions of this

29. Ct.A.R., Government's Memorandum of Law, dated Nov. 22, 1989 at 10.

Court, or otherwise completely devoid of merit as not to involve a federal controversy"). The government never suggested below that the issues presented on the IBT's appeals were "essentially fictitious." Nor did the District Court even hint that it regarded the IBT's claims as insubstantial. Only a brief description of the orders appealed from is required to demonstrate that the IBT's appeals raised claims of a serious, substantial nature.

The October 18 Orders, by granting the Election Officer new powers that the Consent Order by its terms precludes, and by otherwise modifying the Consent Order, violated this Court's directive that a consent decree "must be construed as it is written," *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971), and "effected a substantial modification of the original decree," depriving the IBT of the benefit of its bargain. *Hughes v. United States*, 342 U.S. 353, 357 (1952); accord *United States v. Atlantic Refining Co.*, 360 U.S. 19, 23 (1959). Moreover, the District Court's modifications of the Consent Order interfered with the IBT's right to conduct its own elections, see *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 5-6 (1964), and improperly purported to bind 650 non-parties to the Consent Order. *Martin v. Wilks*, 109 S. Ct. 2180, 2183-85 (1989). The November 16 Order, requiring the IBT to publish the full text of all the District Court's orders in this case, had no colorable basis in the language of the Consent Order and was a patent violation of the IBT's "First Amendment right not to help spread a message with which it disagrees" *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 7 (1986).

To the extent that the dismissal of the IBT's appeals was not for want of jurisdiction, but instead for lack of substantiality, that decision was an evasion of the Second Circuit's mandatory jurisdiction. Unless this Court grants review and reverses, the decision below will remain as precedent for the exercise of a *de facto* Circuit Court certiorari jurisdiction, never sanctioned

by Congress or by this Court, permitting the Courts of Appeals to pick and choose what cases they will hear on the merits. This Court should grant a writ of certiorari to make clear that the Courts of Appeals may not refashion themselves as courts of discretionary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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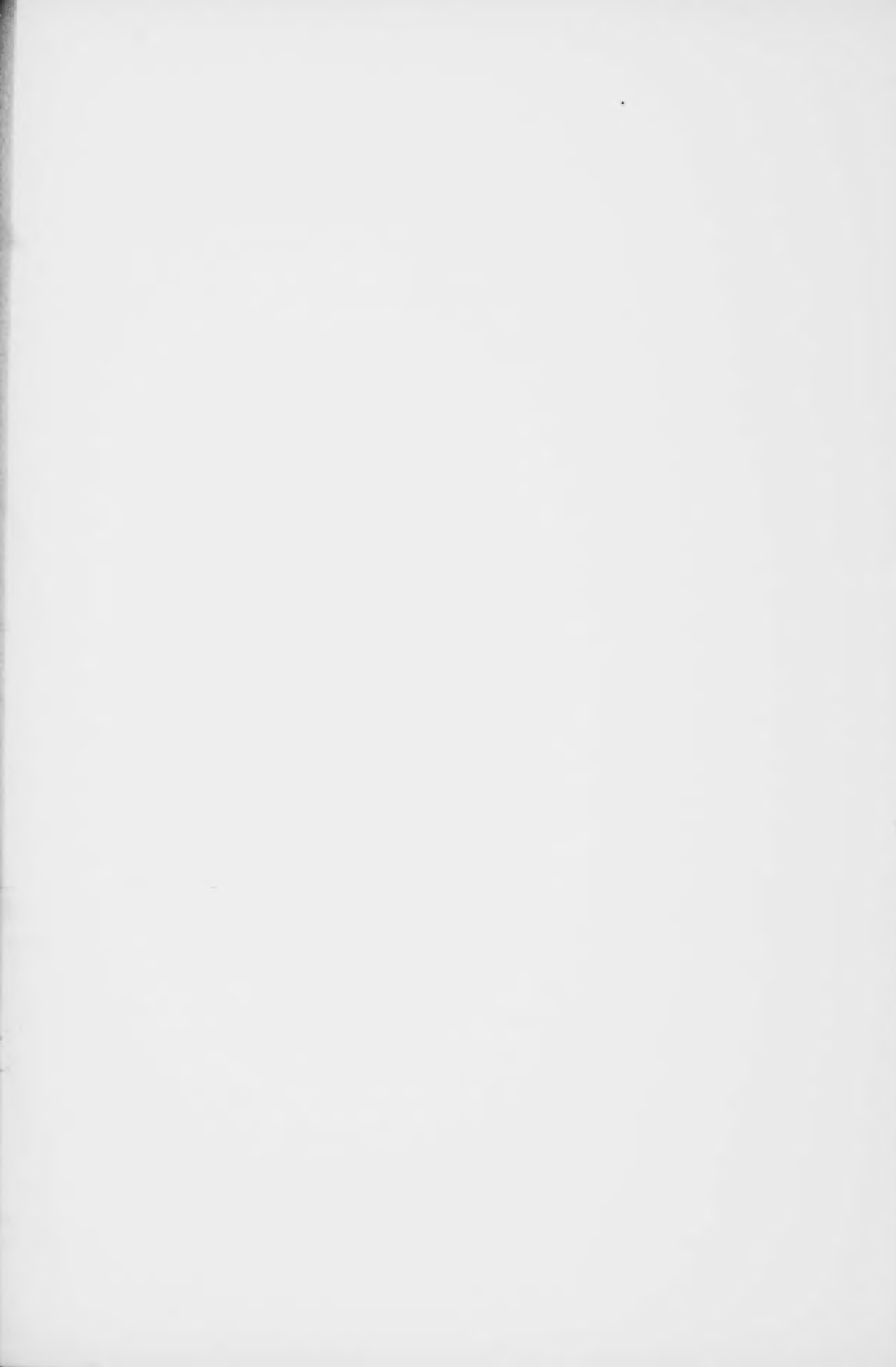
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Counsel for Petitioner

April 1990



APPENDIX



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Before:

HON. WILLIAM H. TIMBERS,
HON. LAWRENCE W. PIERCE,
HON. ROGER J. MINER,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ORDER
89-6252

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,

Defendant-Appellant.

The International Brotherhood of Teamsters having moved for a stay pending appeal and an expedited appeal from orders of the United States District Court for the Southern District of New York (Edelstein, J.) dated October 18, 1989; and the United States of America having moved to dismiss the appeal, it is, upon consideration by the panel,

ORDERED that the motion to dismiss the appeal be, and it hereby is, GRANTED, and it is further

ORDERED that the motion for a stay and expedited appeal be, and it hereby is, DENIED as moot.

[Entered Dec. 13, 1989]

/s/ _____
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Before:

HON. WILLIAM H. TIMBERS,
HON. LAWRENCE W. PIERCE,
HON. ROGER J. MINER,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ORDER
89-6254

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,

Defendant-Appellant.

The International Brotherhood of Teamsters having moved for a stay pending appeal and an expedited appeal from an order of the United States District Court for the Southern District of New York (Edelstein, J.) dated November 16, 1989; and the United States of America having moved to dismiss the appeal, it is, upon consideration by the panel,

ORDERED that the motion to dismiss the appeal be, and it hereby is, GRANTED, and it is further

ORDERED that the motion for a stay and expedited appeal be, and it hereby is, DENIED as moot.

[Entered Dec. 13, 1989]

/s/ _____
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, :

Plaintiff, :

-v-

: MEMORANDUM
: & ORDER

INTERNATIONAL BROTHERHOOD :
OF TEAMSTERS, CHAUFFEURS, 88 CIV. 4486
WAREHOUSEMEN AND HELPERS: (DNE)
OF AMERICA, AFL-CIO, et al.,

Defendants.

EDELSTEIN, District Judge:

Plaintiff United States of America ("the Government") instituted this suit on June 28, 1988, which ultimately sought to rid the defendants, the International Brotherhood of Teamsters ("the IBT"), of the influence of organized crime. This opinion addresses issues raised in the implementation of a voluntary settlement signed on March 14, 1989, ("the Consent Decree") signed by the Government and most defendants named in the June 28, 1988 complaint. The Consent Decree called for the appointment of three Officials, the Independent Administrator, the Election Officer, and the Investigations Officer, ("the Court Officers") who would oversee the IBT's 1991 election for International Officers and file charges against those IBT members accused of corruption pursuant to procedures set forth in the Consent Decree.

The parties were brought together for a hearing on October 13, 1989 ("the hearing") to settle numerous disputes that have arisen in the course of bringing to life the goals embodied in the Consent Decree. This opinion supplements oral rulings made after the hearing to resolve these conflicts so that the Court Officers may discharge their duties.

The parties have brought the following matters before this Court, and they will be addressed in the listed sequence. First, Application II by the Independent Administrator and the Cross-Application filed by the IBT. Second, the Application by the Election Officer Michael Holland to be paid for services rendered. Third, the request by the Government to create a \$100,000 fund to provide a pool for general operating revenue.

The fourth matter, Application III by the Independent Administrator will be considered with the motions for a preliminary injunction filed by Messrs. Friedman and Hughes in a [sic] opinion filed separately from these rulings. Further, the parties have settled the issues in Application IV by the Independent Administrator—to determine the proper salary for a lawyer on the Investigations Officer's staff—since the hearing.

1. Application II by the Independent Administrator

On September 29, 1989 the Independent Administrator submitted Application II to the Court requesting an interpretation of paragraph 12(D) of the Consent Decree. This interpretation will further determine the scope of the duties of the Election Officer. The Consent Decree provides in relevant part that "the Election Officer shall supervise the IBT election..."

In his Application the Independent Administrator has asked for rulings on the following issues:

- a. Delineation of the scope of the duties of the Election Officer;
- b. Approval of the Draft Timetable and Election Officer Activities;
- c. Distribution of the Election Survey;
- d. The Election Officer's staffing requests.

At 8:30 a.m. on October 12, 1989, the IBT submitted papers including Opposition and a Cross-Application to Application II. The IBT asked this Court to accept the Cross-Application as pursuant to paragraph 16 of the Consent Decree, and as responsive to Application II of the Independent Administrator.

Summarily, in their Cross-Application the IBT asks this Court to interpret the Consent Decree with respect to the duties of the Election Officer and prevent him from engaging in any activity other than;

- a. Monitoring the 1991 election for International Officers and any prior special elections to fill those vacancies;
- b. "Supervising" the 1991 election by (1) distributing material to the IBT membership, (2) overseeing the ballot process, and (3) certifying the election results;
- c. Engaging in any activities which affect the IBT constitution or the constitution or by-laws of IBT affiliates.

Further, the IBT refuses to pay for any activity of the Election Officer done in furtherance of goals that it regards as ultra vires. To this end the IBT opposes the fee and expense application of the Election Officer.

As a preliminary matter I find the IBT's Cross-Application improperly submitted according to the procedure set forth in the Consent Decree. The Court granted the IBT leave to file responsive papers. The papers submitted, while termed "In Opposition and a Cross-Application," are in substance and fact full Applications which should be filed according to the procedures set forth in the Consent Decree.

The IBT contends this Cross-Application was filed in accordance with paragraph 16 of the Consent Decree, which grants this Court jurisdiction over disputes and gives parties the right to file Applications for this Court's review. Paragraph 12(I) of the Consent Decree is the only statement of the procedure for filing an Application. The IBT ignored the procedures spelled out in paragraph 12(I), which requires the Administrator to give notice before making an application. The IBT assumes that Applications made by parties need not conform to the minimal procedures required of the Administrator.

As a matter of interpretation of the logic of the Consent Decree, I order that all Applications to this Court must conform with this basic procedure as provided for in paragraph 12(I), including notice to the Court. In this instance, however, since the IBT has submitted detailed papers the consideration of which will decide the issues going to the very core of the Consent Decree, this ruling will include consideration of the IBT's Cross-Application.

a. Scope of Election Officer's Duties

The seminal issue in these disputes concerns the scope of the duties of the Election Officer. The definition of his duties revolves around the interpretation of two crucial phrases in one sentence in paragraph 12(D)(ix) of the Consent Decree: "The Election Officer (1) shall supervise (2) the IBT election ... to be conducted in 1991."

In order to determine the scope of duties of the Election Officer, the Court must first interpret the meaning of the word "supervise" as used in paragraph 12(D) of the Consent Decree.

The Independent Administrator, Election Officer, and the Government understand the term "supervise" to involve an active and broad mandate to intervene in, and coordinate, the IBT electoral process up to and including the next general convention. The Election Officer seeks to promulgate electoral rules and procedures, educate IBT locals on the new process, monitor candidate campaigning, devise absentee voting procedures, and certify all elections. As authority, the Court Officers and the Government define "supervise" as a term of art used in labor law, and point to numerous cases interpreting the parallel language of the Labor Management Reporting and Disclosure Act, the LMRA or Landrum-Griffith Act.¹ In those instances, Courts regularly grant overseers broad authority to act under the rubric of "supervising" elections.

The IBT views the term "supervise" in a more passive framework, urging the Court to interpret the meaning of "supervise" as requiring the Election Officer to oversee the IBT electoral process, and provide post-election advice to locals only when sought. The IBT opposes the Election Officer's proposed proactive steps.

In addition, the IBT fiercely opposes using the term "supervise" as a term of art, and instead seeks to interpose a literal and restrictive definition. The IBT urges the Court not to interpret "supervise" outside of the exact language of the

1. See, e.g., Donovan v. Illinois Educational Association, 667 F.2d 638 (7th Cir. 1982); Hodgson v. Chain Service and Soda Fountain Employees, 355 F.Supp. 180 (S.D.N.Y. 1973).

Consent Decree.²

This first problem involves the meaning of the term "supervise." The IBT envisions the election supervision as passive or advisory. Even a modest definition found in Webster's Third New International Dictionary defines "supervise" as follows: to coordinate, direct, and inspect continuously and at first hand the accomplishment of; oversee with the powers of direction and decision the implementation of one's own or another's intentions. The dictionary definition is supportive of a more expansive interpretation.

Further, I am persuaded that the parties intended the term "supervise" as written here to represent a term of art. "Supervise," as used in this portion of the Consent Decree, should incorporate the connotations connected to its use in the labor law field.

In addition to this definition of "supervise," I find that the specific language of paragraph 12(D), taken together with spirit and intent of the Consent Decree, requires that the term "supervise" be interpreted in its most expansive and proactive meaning.

The second phrase to be interpreted involves the definition of the term "1991 election." The Court Officers and the Government understand that the term "1991 election" includes not only the actual vote at the convention by delegates for

2. The IBT cites the cases of Securities and Exchange Commission v. Levine, 881 F.2d 1165, 1178-79 (2d Cir. 1989); and United States v. Armour & Co., 420 U.S. 673, 381 (1971) for the proposition that Consent Decrees must be interpreted according to their writings. At oral argument, the Government adopted this view, and all parties agree that the Court need only look to the plain language of the Consent Decree to interpret its meaning.

International Officers, but the entire electoral process that culminates in that particular set of votes.

The Court Officers and the Government contend that for the Election officer to properly supervise the IBT election, he must have authority over the entire electoral process leading up to the IBT convention. The Government points out that pages 15-16, the previous two pages of the Consent Decree, detail the electoral process leading up to the 1991 convention election, and that this term obviously incorporates the entire electoral process up to and including the 1991 election of International Officers.

The IBT contends that the phrase "1991 election" as used in the sentence in question refers only to the 1991 convention election for International Officers. As support they again argue that Consent Decrees must be literally interpreted as written, and point out that this sentence as written mentions the 1991 election in the singular, and not elections in the plural, obviously referring only to this one election.

Second, the IBT argues that the intention of the parties, as evidenced by the negotiation process that led to the Consent Decree, was for the Election Officer to have this limited role. The IBT submitted lengthy affidavits containing drafts of the emerging Consent Decree in support of this contention.

I find that the term "1991 election" as written in paragraph 12(D) was intended to encompass the entire electoral process which will culminate in the 1991 election for International Officers. The parties to the Consent Decree intended for the Election Officer to oversee every prelude leading up to and including the final election for International Officers.³

3. The Government, in a sworn amicus letter presented to the Court on October 12, denied the IBT's assertion—as presented in the affidavits that

Such an interpretation is reached by following the IBT's argument that the Consent Decree must be interpreted according to its terms. This interpretation lies wholly within the confines of the Consent Decree as evidenced by its writings, and its intent and spirit. The IBT's request for an evidentiary hearing to further explore these issues is hereby denied.

To this end, I approve the proposed actions of the Elections [sic] Officer, including the right to promulgate electoral rules and procedures for the IBT nomination and election, to conduct an educational program aimed at the IBT membership, to actively supervise, direct, and oversee the campaigning of candidates, to institute absentee voting procedures, and certify all elections. The Election Officer shall have the authority to carry out these actions over any and all facets of the IBT electoral process up to and including the 1991 election for International Officers.

Further, I find that it is within the scope of the duties of the Election Officer to take any further reasonable actions necessary to carry out his duties as the Election Officer and ensure fair elections for the IBT membership.

b. The Draft Timetable of Election Officer Activities

The Election Officer has submitted a proposed timetable that provides the implementation schedule for conducting a local union survey, promulgating rules, meeting with individual locals to conform the local's electoral rules to the general rules, the

accompanied their Cross-Application—that the parties never intended the phrase "1991 election" to encompass the entire electoral process. Mr. Mastro, who signed the Government's amicus letter and conducted the negotiations on behalf of the Government, insists that the Government and IBT negotiators were clear on the expansive meaning of this phrase, agreeing that "1991 election" should encompass the entire electoral process.

supervision of candidate electioneering, a post-election challenge procedure, and the distribution of educational information about the election.

I approve the timetable as set forth by the Election Officer. The Consent Decree runs for a period of three years. During that time, meaningful reforms to the IBT electoral process are to occur. The only way for such changes to be realized is for the Election Officer to follow a strict schedule for implementing changes. To proceed without a timetable would encourage further delay and entrench opposition, all while expending the short time period of the Consent Decree.

Further, since I have found that all of the actions the Election Officer proposes to take listed on the timetable—with the exception of the election survey which we will turn to shortly—are permitted, I see no reason why any further delay should be necessary.

c. Distribution of the Election Survey.

The Election Officer proposes to distribute a survey on local election practices and rules to obtain election related information. The Election Officer is empowered to take reasonable steps to obtain information necessary to carry out his duties. Both the Election Officer and IBT agree a survey is the cheapest and most efficient means available to obtain this electoral information. This particular dispute takes root over the unwillingness of the IBT leadership, specifically the IBT General President Mr. McCarthy or IBT General Counsel Mr. Grady to urge IBT locals to cooperate with the survey.

The IBT contends that the International Union has no authority to order its locals to respond to any survey—that such a step is beyond the bounds of the IBT Constitution. Further, the International Union is reluctant to compel its locals to take

such action, and that locals should decide such issues for themselves.

In keeping with the specified power of the Court Officers to obtain information as provided for in paragraph 12(C), the acknowledged efficiency and necessity of gathering data on local information practices, and the spirit and intent of the Consent Decree, I hereby request the IBT—through General President McCarthy or General Counsel Grady—to issue a written directive requesting IBT locals to comply with the survey. I further find that the survey process should be undertaken commensurate with the timetable established by the Election Officer in the proposed timetable.

d. Election Officer's Staffing Requests

The Election Officer has further asked permission to hire three support staff, a consultant, and a public relations firm to assist him in his duties. The Election Officer proposes to hire one Executive Assistant at \$81,000 per year plus benefits, one Administrative Assistant at \$39,000 plus benefits, and one secretary to be paid in the range of \$26,000 to \$32,000 per year, plus benefits. In addition, the Election Officer proposes to retain a professional labor economics consultant at the rate of \$75 per hour, and a public relations firm.

The Election Officer claims need for the personnel based on the size and scope of his appointed task. He reminds the court of the 1.7 million voting members of the IBT, which, according to the Election Officer, is larger than the voting population of 26 states. The consultant will assist the Election Officer in preparing a database program and algorithm to compile data on the 660 IBT locals. The public relations firm would help with the task of gaining the confidence and compliance of the locals.

The IBT opposes both the staffing requests and the hiring of outside consultants. Their opposition is based on the belief that the Election Officer's duties do not involve the local elections in the fall of 1990, but only the 1991 convention election. The IBT views the Election Officer's staffing requests as arming him for an unwarranted, and exceedingly expensive intrusion into the IBT electoral process.

I have examined the specific personnel requests and the resumes of the individuals the Election Officer proposes to hire that were included in his Affidavit attached to Application II.

I hereby grant all of the Election Officer's personnel requests. While I am mindful of the need to contain costs and not allow the Court Officers free reign to spend without oversight, the herculean size and scope of the Election Officer's duties require adequate staffing. He has requested two full-time staff whom I find qualified for the positions. In addition, I am sympathetic to the data processing and organizational needs of the Election Officer: He must coordinate and monitor over 660 different elections. To accomplish this task, he needs command of the actual situation he confronts.

In addition, I endorse the Election Officer's request to obtain the services of a public relations firm should he find it necessary. I am aware of the positions the Union leaders have taken with regard to the Consent Decree and Court Officers in letters to their membership. Given the IBT's own official stance on this Consent Decree as evinced by the opinions in the official IBT Magazine, public relations help for the Election Officer is necessary.

2. Election Officer Application for Fees and Expenses

On September 28, 1989, I received an application from the Elections [sic] Officer for payment of fees and reimbursement of expenses for his work on IBT related matters during the period May 30, 1989 to August 31, 1989. The Election Officer requests compensation in the amount of \$33,637.50, and reimbursement for expenses in the amount of \$4,484.27. Contesting the Election Officer's submission, the IBT balks at paying for services and expenses incurred performing activities it feels are outside the scope of his duties.

I have reviewed the detailed accounting submitted of the fee requests made by the Election Officer for himself and Ms. Barbara Hillman and Mr. Daniel Koen, who assisted him, and the expenses they incurred. I find the request for fees and expenses reasonable and appropriate, and order the IBT to remit the amount of \$38,121.77 to the Election Officer.

3. The \$100,000 Fund

The Government first submitted a settlement order on September 26, 1989 to create a proposed \$100,000 general operating fund for the purpose of making ready monies available for the three designated Court Officers, the Administrator, Mr. Lacey, the Investigations Officer, Mr. Carberry, and the Elections [sic] Officer, Mr. Holland. The Government would supply the initial \$100,000 amount for the fund, with the Court Officers supplying monthly accountings to the Government. The Court Officers would ultimately seek reimbursement from the IBT.

The IBT vigorously opposed the creation of the \$100,000 fund and launched a caustic exchange of letters between the Government and the Union in the weeks preceding the hearing. The Investigations Officer has written in support of the

Government's efforts, and the Independent Administrator indicated his backing of this application as well.

The Government cites as support for the creation of the fund the Court's power under Rule 8 of the Local Rules for the Southern and Eastern Districts of New York, and its power under the RICO statute, 28 U.S.C. §1962(b).

The IBT's opposition to the creation of the fund may be summarized as follows:

1. That no provision for the fund was made in the Consent Decree; To grant the order would an [sic] impermissible unilateral amendment by the Government;
2. That this Court lacks jurisdiction to create this fund since, as a result of the Consent Decree, there is no RICO action "pending final determination" under §1962(b);
3. The Government improperly invokes Local Rule 8;
4. It will upset the incentive for the Court Officers to work directly and cooperatively with the IBT;
5. The fund is unnecessary since the IBT has fully cooperated with all funding requests made by the Court Officers.

The parties initial positions were reinforced by a week-long exchange of lengthy letters stridently advocating each side's position on the matter.

As a threshold matter, I find that the IBT's jurisdictional arguments lack merit and must be dismissed. I endorse the IBT's outside Counsel's suggestion that this question may be

solved without reaching the ongoing RICO dispute question. This Court has jurisdiction over the Consent Decree, which explicitly vests this Court with continuing and exclusive jurisdiction over matters that arise in this case.

I find that this relief does not fall outside the construction of the Consent Decree. The creation of the fund makes no substantive changes in the IBT's rights and liabilities, but rather alters some funding mechanisms. The IBT's right to object to expenses is preserved, and if the Court finds the Court Officers used the fund for any frivolous expenditures, the Government would ultimately be liable. In addition to the language of the decree, the spirit and intent of the Decree allows this fund.

The IBT arguments are weakened here since they have accepted financial help from the Government in the past, including temporary office space and office furniture for the Court Officers, costs that under the Consent Decree should clearly have been borne by the IBT. Applying the IBT's current arguments, such help would also fall outside the explicit language of the Consent Decree. I find the fund will foster dialogue and cooperation between the parties.

I hereby find that the proposed settlement order creating the \$100,000 fund, dated September 26, 1989, is proper and order that it be carried out.

Despite the IBT's admonitions to the contrary, it appears that funding for the Court Officers remains a major issue diverting the Officer's attentions. The IBT maintains that it pays whatever bills the Officers submit pending scrutiny to protect the funds of the IBT membership. While the court lauds the interest of the IBT in saving their membership money, I find the IBT's current pattern of behavior unacceptable.

To streamline the funding process, I order the following revision in reimbursement procedure, agreed to by the parties. Each of the Court Officers will submit their quarterly expense and fee applications to the IBT and the Court simultaneously. The IBT shall then have three business days to submit their objections to the expenses to the Court. I will examine the submissions and objections and rule on them promptly. Staff members will continue to be paid monthly without any change in procedure.

Application IV by the Independent Administrator

The parties have submitted a stipulated settlement on this matter, arriving at a compromise on the salary and benefits of Mr. Gaffey. I endorse this settlement.

4. Application III by the Independent Administrator.

The Independent Administrator has requested that I rule on his jurisdiction to pursue charges against Mr. Harold Friedman and Mr. Anthony Hughes, whom he ruled against in an opinion dated September 29, 1989.

In response, Friedman and Hughes jointly and separately have made a motion to this Court pursuant to Rule 65 seeking injunctive relief barring the Administrator from hearing the charges brought by the Investigations Officer against them. Their injunction seeks to have this Court enjoin Mr. Lacey from conducting the hearing, or in the alternative, order that they not be collaterally estopped from raising factual issues decided in their criminal conviction in U.S. v. Friedman, 86 Cr. 114, in the Northern District of Ohio. I will rule on Application III, and Friedman and Hughes' motion for a preliminary injunction in a separate opinion.

Conclusion

This opinion settles a large number of matters relating to the Consent Decree entered into between the United States of America and the International Brotherhood of Teamsters and others, the IBT. The explicit and implicit purpose of the Consent Decree is to rid the union of the hideous cloud of corruption that envelops it.

After six months of these skirmishes I would now like to firmly establish that the parties must not only adhere by the letter of the Consent Decree, but must abide by its spirit as well. The spirit and intention of this Consent Decree command that its specific language be given the most reasonable possible interpretation. For this Consent Decree to continue to be viable and meaningful, the Court Officers must not be hampered in the performance of their obligatory duties. Finally, I would strongly encourage the parties to compromise and settle disputes in the spirit and intent of a voluntary decree whenever possible.

SO ORDERED.

DATED: October 18, 1989
New York, New York

/s/ David N. Edelstein
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

- v. -

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF
AMERICA, AFL-CIO, et al.,

Defendants.

x

:

:

: ORDER

: 88 Civ. 4486
(DNE)

:

x

IT IS HEREBY ORDERED, pursuant to 18 U.S.C. 1964(b), that the United States of America shall, as soon as possible but by no later than October 9, 1989, deposit \$100,000.00 into an interest-bearing bank account, said money to be used to establish a general operating fund ("the General Fund") for the benefit of the Administrator, the Investigations Officer and the Elections [sic] Officer (and any designees or persons hired by them) ("the Court Officers"). The Court Officers may draw from the General Fund in order to pay the compensation, expenses or other costs associated with any of their activities under the Consent Order of March 14, 1989 ("the Consent Order"). The Court Officers shall account on a monthly basis to the United States of America for the money drawn from the General Fund. To the extent permitted under the Consent Order, the Court Officers shall attempt to obtain reimbursement from the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO ("the IBT") for any such compensation, expenses or costs paid by

withdrawals from the General Fund and, upon receipt of any such reimbursement from the IBT, the Court Officers shall promptly deposit those reimbursement monies into the General Fund. Upon completion of the activities of the Court Officers under the Consent Order and upon receipt of full payment from the IBT of the costs arising out of those activities, any money remaining in the General Fund shall be returned to the United States.

Dated: October 18, 1989
 New York, New York

/s/

DAVID N. EDELSTEIN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, X
:

Plaintiff, :

-v-

: ORDER

INTERNATIONAL BROTHERHOOD : 88 CIV. 4486
OF TEAMSTERS, CHAUFFEURS, (DNE)
WAREHOUSEMEN AND HELPERS :
OF AMERICA, AFL-CIO, et al., :

Defendants.

X

EDELSTEIN, District Judge:

WHEREAS on November 1, 1989 the Independent Administrator filed Application V with this Court seeking sanctions against the International Brotherhood of Teamsters (the "IBT") by reason that the IBT failed to notify him of two meetings—on October 16-18 and November 1, 1989—of the IBT General Executive Board (the "GEB"); and

WHEREAS on November 3, 1989 the Independent Administrator filed Application VI with this Court seeking a clarification of issues relating to the IBT's decisions to alter the publication frequency of the International Teamster from monthly to quarterly; and

WHEREAS on November 8, 1989 the IBT filed a memorandum of law and affidavits in opposition to Applications V & VI; and

WHEREAS plaintiff United States of America (the "Government") joined Applications V & VI in all respects; and

WHEREAS on November 13, 1989 a hearing was held to resolve the issues raised in Applications V & VI (the "application hearing"); and

WHEREAS on November 15 a further hearing was held to clarify the orders of this Court made regarding the publication of this Court's opinions and other related matters (the "publication hearing"); and

WHEREAS with respect to the issues raised by Application V, at the application hearing the Independent Administrator gave actual notice to the IBT that he would attend all regularly scheduled quarterly meetings of the IBT GEB and all special meetings of the GEB as well; and

WHEREAS in the spirit of cooperation the Independent Administrator and the Government withdrew their request for sanctions; and

WHEREAS since the parties were able to settle this matter this Court refrains from interpreting the Consent Decree with regard to the notice the IBT must give the Court Officers before regular or special meetings of the GEB; and

WHEREAS the Independent Administrator has requested an agenda of the November 1, 1989, special meeting, which the IBT has refused to provide, since it has claimed the material discussed is protected by the attorney client privilege. The IBT has agreed to furnish the Independent Administrator with an agenda for the regular quarterly meeting held October 16-18, 1989.

WHEREAS with respect to Application VI, paragraph F.12.(E) of the Consent Decree provides that the Independent Administrator shall have the authority to

"distribute materials at reasonable times to the membership of the IBT about the Administrator's activities." Further, the same paragraph gives the Independent Administrator "the authority to publish a report in each issue of the International Teamster concerning the activities of the Administrator, Investigations Officer and Election Officer; and

WHEREAS the Independent Administrator has been filing monthly reports on the status of the Consent Decree and the work of the Court Officers in the IBT magazine International Teamster, which has been published monthly, in order to keep the IBT rank and file abreast of these developments; and

WHEREAS when the Consent Decree was negotiated and signed the International Teamster was published monthly, with no indication that its publication schedule would be changed; and

WHEREAS the IBT now intends to reduce the publication frequency of the International Teamster from monthly to quarterly because the IBT contends such a change would save \$3.5 million dollars annually; and

WHEREAS by Application VI the Independent Administrator asserts that the IBT is changing the publication schedule in order to reduce his communication with the IBT rank and file; and

WHEREAS in sworn statements the IBT states that the sole reason for altering the publication schedule of the International Teamster is as a cost-saving measure in response to the expense of the instant litigation and was in no way an attempt to reduce the Independent Administrator's communication with the IBT membership; and

WHEREAS the Independent Administrator submitted Application VI to this Court seeking to depose the IBT GEB as

to their true motive for the change in publication of the International Teamster; and

WHEREAS this Court determines that the spirit and intent of the Consent Decree require that the IBT membership be kept appraised of the activities of this Court by publication of this Court's opinions and the actions of Court Officers. This Court further believes that it is imperative that the rank and file of the IBT be kept aware of the actions, activities, and postures of its leadership in implementing this Consent Decree. The IBT membership must not be kept in the dark as to these happenings: Such a condition would be intolerable;

THEREFORE this Court orders that:

1. Regarding Application V, the IBT shall provide the material for which they claim attorney-client privilege to this Court for in camera review.

2. All opinions and orders by this Court shall be promptly distributed in full, within 30 days, to the IBT membership as a whole without commentary, embellishment, or editing.

3. The specific language of paragraph F.12.(E)—which allows the Independent Administrator to communicate with the IBT membership at "reasonable" times and in each issue of the International Teamster magazine—in conjunction with the spirit and intent of the Consent Decree is interpreted so that the Independent Administrator shall be able to communicate monthly with the IBT membership. "Reasonable" communication is hereby defined as monthly communication.

This Court further orders that this communication may be made either by (a) continued monthly publication of the International Teamster or (b) by monthly mailing of a report by the Independent Administrator to the IBT rank and file as a whole at IBT expense.

In addition, these monthly mailings or magazine issues should include a full text of the current opinions of this Court.

4. The IBT shall refrain from publishing the December issue of the International Teamster for the few days so that this Court's October 18, November 2, November 6, and November 16 opinions may be included.

5. The December issue of the International Teamster is to include a page reference in the Table of Contents to the Independent Administrator's Report VI.

6. The full text of the Independent Administrator's Report VI is to be published in the December issue of the International Teamster.

7. The Independent Administrator's request for depositions has been withdrawn without prejudice and this Court will make no ruling as a result.

8. The IBT shall immediately pay the Independent Administrator's outstanding invoice except for items it questions; and that as to such exceptions, it will notify the Independent Administrator about them on or before November 27, 1989, so they can be promptly resolved.

So Ordered.

Dated: New York, New York
November 16, 1989

/s/ DNE

U.S.D.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 12th day of February, one thousand nine hundred and ninety.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,
AFL-CIO,

Defendant-Appellant.

DOCKET
NUMBERS:
89-6252,
89-6254

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/

ELAINE B. GOLDSMITH

Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-v-

INTERNATIONAL BROTHERHOOD OF: 88 CIV.
TEAMSTERS, CHAUFFEURS, : 4486 (DNE)
WAREHOUSEMEN AND HELPERS :
OF AMERICA, AFL-CIO, et al., :
Defendants. :

ORDER

WHEREAS, plaintiff United States of America commenced this action on June 28, 1988, by filing a Complaint seeking equitable relief involving the International Brotherhood of Teamsters, AFL-CIO (hereinafter, "the IBT"), pursuant to the civil remedies provisions of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1964; and

WHEREAS, the Summons and Complaint have been served, answers filed, and pretrial discovery commenced by and between the parties; and

WHEREAS, plaintiff United States of America and defendants IBT and its General Executive Board, William J. McCarthy, Weldon Mathis, Joseph Trerotola, Joseph W. Morgan, Edward M. Lawson, Arnold Weinmeister, Donald Peters, Walter J. Shea, Harold Friedman, Jack D. Cox, Don L. West, Michael J. Riley, Theodore Cozza and Daniel Ligurotis (hereinafter, the "union defendants") have consented to entry of this order; and

WHEREAS, the union defendants acknowledge that there have been allegations, sworn testimony and judicial findings of past problems with La Cosa Nostra corruption of various elements of the IBT; and

WHEREAS, the union defendants agree that there should be no criminal element or La Cosa Nostra corruption of any part of the IBT; and

WHEREAS, the union defendants agree that it is imperative that the IBT, as the largest trade union in the free world, be maintained democratically, with integrity and for the sole benefit of its members and without unlawful outside influence;

IT IS HEREBY ORDERED AND DECREED

That:

A. COURT JURISDICTION

1. This Court has jurisdiction over the subject matter of the action, has personal jurisdiction over the parties, and shall retain jurisdiction over this case until further order of the Court.

2. Upon satisfactory completion and implementation of the terms and conditions of this order, this Court shall entertain a joint motion of the parties hereto for entry of judgment dismissing this action with prejudice and without costs to either party.

B. DURATION

3. The authority of the court officers established in paragraph no. 12 herein shall terminate after the certification of the 1991 election results by the Election Officer for all IBT International Officers as provided in this Order, except as follows:

(1) The Election Officer and the Administrator shall have the authority to resolve all disputes concerning the conduct and/or results of the elections conducted in 1991 under the authority granted to them under paragraph 12(D) herein, and the Investigations Officer and the Administrator shall have the authority to investigate and discipline any corruption associated with the conduct and/or results of the elections to be conducted in 1991 under the authority granted them under paragraph 12(A) and (C) herein, so long as said investigation is begun within six months of the final balloting.

(2) The Investigations Officer and the Administrator shall have the authority to resolve to completion and decide all charges filed by the Investigations Officer on or before the date on which the authority granted to them under paragraphs 12(A) and (C) herein terminates the authority pursuant to subparagraph (3) below.

(3) The role and authority provided for in paragraphs 12 and 13 of this Order regarding the Investigations Officer and the Administrator and their relationship with the Independent Review Board shall terminate not later than nine (9) months after the certification of the 1991 election results.

(4) As used herein, the date referred to as "the certification of the 1991 election results" shall be

construed to mean either the date upon which the Election Officer certifies the 1991 election results for all IBT International Officers or one month after the final balloting, whichever is shorter.

C. STATUS OF THE INDIVIDUAL UNION DEFENDANTS

4. The union defendants herein remain as officers of the IBT, subject to all of the terms herein, including the disciplinary authority of the Court-appointed officers, described in paragraph 12(A) herein.

D. CHANGES IN THE IBT CONSTITUTION

5. The portion of Section 6(a) of Article XIX of the IBT Constitution that provides, "Any charge based upon alleged conduct which occurred more than one (1) year prior to the filing of such charge is barred and shall be rejected by the Secretary-Treasurer, except charges based upon the non-payment of dues, assessment and other financial obligations," shall be and hereby is amended to provide for a five (5) year period, running from the discovery of the conduct giving rise to the charge. This limitation period shall not apply to any actions taken by the Investigations Officer or the Administrator.

6. Section 6(a) of Article XIX of the IBT Constitution shall be deemed and is hereby amended to include the following: "Nothing herein shall preclude the General President and/or General Executive Board from suspending a member or officer facing criminal or civil trial while the charges are pending."

7. Immediately after the conclusion of the IBT elections to be conducted in 1991, Section 8 of Article VI of the IBT Constitution shall be deemed and hereby is amended to provide that a special election be held whenever a vacancy occurs in the office of IBT General President, pursuant to the procedures described later herein for election of IBT General President.

8. Article IV, Section 2 of the IBT Constitution shall be deemed and is hereby amended to include a new paragraph as follows:

"No candidate for election shall accept or use any contributions or other things of value received from any employers, representative of an employer, foundation, trust or any similar entity. Nothing herein shall be interpreted to prohibit receipt of contributions from fellow employees and members of this International Union. Violation of this provision shall be grounds for removal from office."

9. (a) The IBT Constitution shall be deemed and hereby is amended to incorporate and conform with all of the terms set forth in this order.

(b) By no later than the conclusion of the IBT convention to be held in 1991, the IBT shall have formally amended the IBT Constitution to incorporate and conform with all of the terms set forth in this order by presenting said terms to the delegates for a vote. If the IBT has not formally so amended the IBT Constitution by that date, the Government retains the right to seek any appropriate action, including enforcement of this order, contempt or reopening this litigation.

E. PERMANENT INJUNCTION

10. Defendants William J. McCarthy, Weldon Mathis, Joseph Trerotola, Joseph W. Morgan, Edward M. Lawson, Arnold Weinmeister, Donald Peters, Walter J. Shea, Harold Friedman, Jack D. Cox, Don L. West, Michael J. Riley, Theodore Cozza and Daniel Ligurotis, as well as any other or future IBT General Executive Board members, officers, representatives, members and employees of the IBT, are hereby permanently enjoined from committing any acts of racketeering activity, as defined in 18 U.S.C. § 1961 *et seq.*, and from knowingly associating with any member or associate of the Colombo Organized Crime Family of La Cosa Nostra, the Genovese Organized Crime Family of La Cosa Nostra, the Gambino Organized Crime Family of La Cosa Nostra, the Lucchese Organized Crime Family of La Cosa Nostra, the Bonnano Organized Crime Family of La Cosa Nostra, any other Organized Crime Families of La Cosa Nostra or any other criminal group, or any person otherwise enjoined from participating in union affairs, and from obstructing or otherwise interfering with the work of the court-appointed officers or the Independent Review Board described herein.

11. As used herein, the term, "knowingly associating," shall have the same meaning as that ascribed to that term in the context of comparable federal proceedings or federal rules and regulations.

F. COURT-APPOINTED OFFICERS

12. The Court shall appoint three (3) officers — an Independent Administrator, an Investigations Officer and an Election Officer — to be identified and proposed by the Government and the union defendants, to oversee certain operations of the IBT as described herein. The parties shall jointly propose to the Court at least two persons for each of these three

positions. Such proposal shall be presented to the Court within four weeks of the date of the entry of this Order, except that for good cause shown such period may be extended by the Court. Except as otherwise provided herein, the duties of those three officers shall be the following:

(A) DISCIPLINARY AUTHORITY —

From the date of the Administrator's appointment until the termination of the Administrator's authority as set forth in paragraph 3(3) herein, the Administrator shall have the same rights and powers as the IBT's General President and/or General Executive Board under the IBT's Constitution (including Articles VI and XIX thereof) and Title 29 of the United States Code to discharge those duties which relate to: disciplining corrupt or dishonest officers, agents, employees or members of the IBT or any of its affiliated entities (such as IBT Locals, Joint Councils and Area Conferences), and appointing temporary trustees to run the affairs of any such affiliated entities. The Investigations Officer shall have the authority to investigate the operation of the IBT or any of its affiliates and, with cause,

(i) To initiate disciplinary charges against any officer, member or employee of the IBT or any of its affiliates in the manner specified for members under the IBT Constitution and,

(ii) To institute trusteeship proceedings for the purpose and in the manner specified in the IBT Constitution.

Prior to instituting any trusteeship proceeding the Investigations Officer shall notify the General President of the Investigations Officer's plan to institute said trusteeship proceeding and the basis therefor and give the General President ten (10) days to exercise his authority pursuant to IBT

Constitution to institute such trusteeship proceedings. If the General President timely institutes such proceedings and/or a trusteeship is imposed, the Investigations Officer and the Administrator shall have authority to review any action thus taken by the General President and/or any trusteeship imposed thereafter and to modify any aspect of either of the above at any time and in any manner consistent with applicable federal law. If the General President fails to institute trusteeship proceedings within the ten-day period prescribed herein, the Investigations Officer may immediately proceed in accordance with the authority specified above.

When the Investigations Officer files charges, the following procedures shall be observed:

(a) the Investigations Officer shall serve written specific charges upon the person charged;

(b) the person charged shall have at least thirty (30) days prior to hearing to prepare his or her defense;

(c) a fair and impartial hearing shall be conducted before the Administrator;

(d) the person charged may be represented by an IBT member at the hearing; and

(e) the hearing shall be conducted under the rules and procedures generally applicable to labor arbitration hearings.

The Administrator shall preside at hearings in such cases and decide such cases using a "just cause" standard. The Investigations Officer shall present evidence at such hearings. As to decisions of the IBT General Executive Board on disciplinary charges and trusteeship proceedings during the

Administrator's tenure, the Administrator shall review all such decisions, with the right to affirm, modify or reverse such decisions and, with respect to trusteeship proceedings, to exercise the authority granted above in this paragraph. Any decision of the Administrator shall be final and binding, subject to the Court's review as provided herein. For a period of up to fourteen (14) days after the Administrator's decision, any person charged or entity placed in trusteeship adversely affected by the decision shall have the right to seek review by this Court of the Administrator's decision. The Administrator shall also have the right to establish and disseminate new guidelines for investigation and discipline of corruption within the IBT. All of the above actions of the Administrator and Investigations Officer shall be in compliance with applicable Federal laws and regulations.

(B) REVIEW AUTHORITY — F r o m the date of the Administrator's appointment until the certification of the IBT elections to be conducted in 1991, the Administrator shall have the authority to veto whenever the Administrator reasonably believes that any of the actions or proposed actions listed below constitutes or furthers an act of racketeering activity within the definition of Title 18 U.S.C. § 1961, or furthers or contributes to the association directly, or indirectly, of the IBT or any of its members with the LCN or elements thereof:

(i) any expenditures or proposed expenditure of International Union funds or transfer of International Union property approved by any officers, agents, representatives or employees of the IBT,

(ii) any contract or proposed contract on behalf of the International

Union, other than collective bargaining agreements, and

(iii) any appointment or proposed appointments to International Union office of any officer, agent, representative or employee of the IBT.

In any case where the Administrator exercises veto authority, the action or proposed action shall not go forward. The Administrator, upon request of the IBT's General President or General Executive Board, shall, within three (3) days, advise the IBT's General President and/or General Executive Board whichever is applicable, of the reasons for any such veto. For a period of up to fourteen (14) days after the Administrator's decision, the IBT's President and/or General Executive Board shall have the right to seek review by this Court of the Administrator's decision. The Administrator may prescribe any reasonable mechanism or procedure to provide for the Administrator's review of actions or proposed actions by the IBT, and every officer, agent, representative or employee of the IBT shall comply with such mechanism or procedure.

(C) ACCESS TO INFORMATION —

(i) The Investigations Officer shall have the authority to take such reasonable steps that are lawful and necessary in order to be fully informed about the activities of the IBT in accordance with the procedures as herein established. The Investigations Officer shall have the right:

(a) To examine books and records of the IBT and its affiliates, provided the entity to be examined receives three (3) business days advance notice in writing, and said entity has the right to have its representatives present during said examination.

(b) To attend meetings or portions of meetings of the General Executive Board relating in any way to any of the officer's rights or duties as set forth in this Order, provided that prior to any such meeting, the officer shall receive an agenda for the meeting and then give notice to the General President of the officer's anticipated attendance.

(c) To take and require sworn statements or sworn in-person examinations of any officer, member, or employee of the IBT provided the Investigations Officer has reasonable cause to take such a statement and provided further that the person to be examined receives at least ten (10) days advance notice in writing and also has the right to be represented by an IBT member or legal counsel of his or her own choosing, during the course of said examination.

(d) To take, upon notice and application for cause made to this Court, which shall include affidavits in support thereto, and the opportunity for rebuttal affidavits, the sworn statements or sworn in person examination of persons who are agents of the IBT (and not covered in subparagraph (c) above).

(e) To retain an independent auditor to perform audits upon the books and records of the IBT or any of its affiliated entities (not including benefit funds subject to ERISA), provided said entity receives three (3) business days advance notice in writing and said entity has the right to have its representatives present during the conduct of said audit.

(ii) The Independent Administrator and the Election Officer shall have the same rights as the Investigations Officer as provided in sections (a), (b), (c) and (d) of A, herein.

(iii) The Independent Administrator, Investigations Officer and Election Officer shall each be provided with suitable office space at the IBT headquarters in Washington, D.C.

D. IBT ELECTION — The IBT Constitution shall be deemed amended, and is hereby amended, to provide for the following new election procedures:

(i) The procedures described herein shall apply to elections of the IBT's General President, General Secretary-Treasurer, International Union Vice Presidents, and International Union Trustees;

(ii) Delegates to the IBT International convention at which any International Union officers are nominated or elected shall be chosen by direct rank-and-file secret balloting shortly before the convention (but not more than six months before the convention, except for those delegates elected at local union elections scheduled to be held in the fall of 1990), and with all convention Candidate election voting by secret ballot of each delegate individually;

(iii) Delegates shall nominate candidates for eleven (11) Regional Vice Presidents, as follows: Three (3) from the Eastern Conference, three (3) from the Central Conference, two (2) from the Southern Conference, two (2) from the

Western Conference, and one (1) from the Canadian Conference. In addition, there shall be nominated candidates for five (5) Vice Presidents to be elected at large. All duly nominated Vice Presidents shall stand for election conducted at local unions on the same ballot and time as the election of General President and General Secretary-Treasurer, as provided herein;

(iv) At such an International convention, after the nomination of International Union Vice Presidents and election of Trustees, all delegates shall then vote for nominees for the offices of IBT General President and Secretary-Treasurer;

(v) To qualify for the ballot for the direct rank-and-file voting for IBT General President, Secretary-Treasurer, and Vice President, candidates must receive at least five (5) percent of the delegate votes at the International convention, for the at large position, or by conference for regional positions, as the case may be;

(vi) No person on the ballot for the position of IBT General President may appear on the ballot in the same election year for the position of Secretary-Treasurer; and further no member shall be a candidate for more than one (1) Vice President position;

(vii) No less than four (4) months and no more than six (6) months after the International convention at which candidates were nominated, the IBT General President, General Secretary-Treasurer and Vice Presidents shall be elected by direct rank-and-file voting by secret ballot in unionwide, one-member, one-vote elections for each at large position, and conference wide, one-member one-vote elections for each regional position;

(viii) All direct rank-and-file voting by secret ballot described above shall be by in-person ballot box voting at local unions or absentee ballot procedures where necessary, in accordance with Department of Labor regulations; and

(ix) The current procedures under the IBT Constitution for filling a vacancy between elections in the office of General Secretary-Treasurer, International Trustee, and International Vice President shall remain in effect.

The Election Officer shall supervise the IBT election described above to be conducted in 1991 and any special IBT elections that occur prior to the IBT elections to be conducted in 1991. In advance of each election, the Election Officer shall have the right to distribute materials about the election to the IBT membership. The Election Officer shall supervise the balloting process and certify the election results for each of these elections as promptly as possible after the

balloting. Any disputes about the conduct and/or results of elections shall be resolved after hearing by the Administrator.

The union defendants consent to the Election Officer, at Government expense, to supervise the 1996 IBT elections. The union defendants further consent to the U.S. Department of Labor supervising any IBT elections or special elections to be conducted after 1991 for the office of the IBT General President, IBT General Secretary-Treasurer, IBT Vice President, and IBT Trustee.

At the IBT 1991 International Convention, the delegates shall be presented with these aforesaid amendments for vote; provided further that nothing herein shall be deemed or interpreted or applied to abridge the Landrum-Griffin free speech right of any IBT officer, delegate or member, including the parties hereto.

(E) REPORTS TO MEMBERSHIP —

The Administrator shall have the authority to distribute materials at reasonable times to the membership of the IBT about the Administrator's activities. The reasonable cost of distribution of these materials shall be borne by the IBT. Moreover, the Administrator shall have the authority to publish a report in each issue of the International Teamster concerning the activities of the Administrator, Investigations Officer and Election Officer.

(F) REPORTS TO THE COURT —

The Administrator shall report to the Court whenever the Administrator sees fit but, in any event, shall file with the Court a written report every three (3) months about the activities of the Administrator, Investigations Officer and Election Officer. A copy of all reports to the Court by the Administrator shall be served on plaintiff United States of America, the IBT's General President and duly designated IBT counsel.

(G) **HIRING AUTHORITY** — The Administrator, the Investigations Officer and the Election Officer shall have the authority to employ accountants, consultants, experts, investigators or any other personnel necessary to assist in the proper discharge of their duties. Moreover, they shall have the authority to designate persons of their choosing to act on their behalf in performing any of their duties, as outlined in subparagraphs above. Whenever any of them wish to designate a person to act on their behalf, they shall give prior written notice of the designation to plaintiff United States of America, and the IBT's General President; and those parties shall then have the right, within fourteen (14) days of receipt of notice, to seek review by this Court of the designation, which shall otherwise take effect fourteen (14) days after receipt of notice.

(H) **COMPENSATION AND EXPENSES** — The compensation and expenses of the Administrator, the Investigations Officer and the Election Officer (and any designee or persons hired by them) shall be paid by the IBT. Moreover, all costs associated with the activities of these three officials (and any designee or persons hired by them) shall be paid by the IBT. The Administrator, Investigations Officer and Election Officer shall file with the Court (and serve on plaintiff United States of America and the IBT's General President and designated IBT counsel) an application, including an itemized bill, with supporting material, for their services and expenses once every three months. The IBT's General President shall then have fourteen (14) business days following receipt of the above in which to contest the bill before this Court. If the IBT's President fails to contest such a bill within that 14-day period, the IBT shall be obligated to pay the bill. In all disputes concerning the reasonableness of the level or amount of compensation or expense to be paid, the Court and parties shall be guided by the level of payment as authorized and approved by the IBT for the payment of similar services and expenses.

(I) APPLICATION TO THE COURT —

The Administrator may make any application to the Court that the Administrator deems warranted. Upon making any application to the Court, the Administrator shall give prior notice to plaintiff United States of America, the IBT's General President and designated IBT counsel and shall serve any submissions filed with the Court on plaintiff United States of America, the IBT's General President and designated IBT counsel. Nothing herein shall be construed as authorizing the parties or the Court-appointed officers to modify, change or amend the terms of this Order.

G. INDEPENDENT REVIEW BOARD

Following the certification of the 1991 election results, there shall be established an Independent Review Board, (hereinafter, referred to as the "Review Board"). Said Board shall consist of three members, one chosen by the Attorney General of the United States, one chosen by the IBT and a third person chosen by the Attorney General's designee and the IBT's designee. In the event of a vacancy, the replacement shall be selected in the same manner as the person who is being replaced was selected.

(a) The Independent Review Board shall be authorized to hire a sufficient staff of investigators and attorneys to investigate adequately (1) any allegations of corruption, including bribery, embezzlement, extortion, loan sharking, violation of 29 U.S.C. §530 of the Landrum Griffin Act, Taft-Hartley Criminal violations or Hobbs Act violations, or (2) any allegations of domination or control or influence of any IBT affiliate, member or representative by La Cosa Nostra or any other organized crime entity or group, or (3) any failure to cooperate fully with the Independent Review Board in any investigation of the foregoing.

(b) The Independent Review Board shall exercise such investigative authority as the General President and General Secretary-Treasurer are presently authorized and empowered to exercise pursuant to the IBT Constitution, as well as any and all applicable provisions of law.

(c) All officers, members, employees and representatives of the IBT and its affiliated bodies shall cooperate fully with the Independent Review Board in the course of any investigation or proceeding undertaken by it. Unreasonable failure to cooperate with the Independent Review Board shall be deemed to be conduct which brings reproach upon the IBT and which is thereby within the Independent Review Board's investigatory and decisional authority.

(d) Upon completion of an investigation, the Independent Review Board shall issue a written report detailing its findings, charges, and recommendations concerning the discipline of union officers, members, employees, and representatives and concerning the placing in trusteeship of any IBT subordinate body. Such written reports shall be available during business hours for public inspection at the IBT office in Washington, D.C.

(e) Any findings, charges, or recommendations of the Independent Review Board regarding discipline or trusteeship matters shall be submitted in writing to an appropriate IBT entity (including designating a matter as an original jurisdiction case for General Executive Board review), with a copy sent to the General President and General Executive Board. The IBT entity to which a matter is referred shall thereupon promptly take whatever action is appropriate under the circumstances, as provided by the IBT Constitution and applicable law. Within 90 days of the referral, that IBT entity must make written findings setting forth the specific action taken and the reasons for that action.

(f) The Independent Review Board shall monitor all matters which it has referred for action if, in its sole judgment, a matter has not been pursued and decided by the IBT entity to which the matter has been referred in a lawful, responsible, or timely manner, or that the resolution proposed by the relevant IBT entity is inadequate under the circumstances, the Independent Review Board shall notify the IBT affiliate involved of its view, and the reasons therefor. A copy of said notice shall be sent by the Independent Review Board, to the General President and the General Executive Board.

(g) Within 10 days of the notice described in paragraph (f) above, the IBT entity involved shall set forth in writing any and all additional actions it has taken and/or will take to correct the defects set forth in said notice and a deadline by which said action may be completed. Immediately thereafter, the Independent Review Board shall issue a written determination concerning the adequacy of the additional action taken and/or proposed by the IBT entity involved. If the Independent Review Board concludes that the IBT entity involved has failed to take or propose satisfactory action to remedy the defects specified by the Independent Review Board's notice, the Independent Review Board shall promptly convene a hearing, after notice to all affected parties. All parties shall be permitted to present any facts, evidence, or testimony which is relevant to the issue before the Independent Review Board. Any such hearing shall be conducted under the rules and procedures generally applicable to labor arbitration hearings.

(h) After a fair hearing has been conducted, the Independent Review Board shall issue a written decision which shall be sent to the General President, each member of the General Executive Board, and all affected parties.

(i) The decision of the Independent Review Board shall be final and binding, and the General Executive Board shall take all action which is necessary to implement said decision, consistent with the IBT Constitution and applicable Federal laws.

(j) The Independent Review Board shall have the right to examine and review the General Executive Board's implementation of the Independent Review Board's decisions; in the event the Independent Review Board is dissatisfied with the General Executive Board's implementation of any of its decisions, the Independent Review Board shall have the authority to take whatever steps are appropriate to insure proper implementation of any such decision.

(k) The Independent Review Board shall be apprised of and have the authority to review any disciplinary or trusteeship decision of the General Executive Board, and shall have the right to affirm, modify, or reverse any such decision. The Independent Review Board's affirmation, modification, or reversal of any such General Executive Board decision shall be in writing and final and binding.

(l) The IBT shall pay all costs and expenses of the Independent Review Board and its staff (including all salaries of Review Board members and staff). Invoices for all such costs and expense shall be directed to the General President for payment.

(m) The Investigations Officer and the Administrator shall continue to exercise the investigatory and disciplinary authority set forth in paragraph 12 above for the limited period set forth in paragraph 3(3) above, provided, however, that the Investigations Officer and the Administrator may, instead, refer any such investigation or disciplinary matter to the Independent Review Board.

(n) The IBT Constitution shall be deemed and hereby is amended to incorporate all of the terms relating to the Independent Review Board set forth above in this paragraph. This amendment shall be presented to the delegates to the 1991 Convention for vote.

H. INDEMNIFICATION

13. The IBT shall purchase a policy of insurance in an appropriate amount to protect the Administrator, the Investigations Officer, the Election Officer and persons acting on their behalf from personal liability for any of their actions on behalf of the IBT, the Administrator, the Investigations Officers or the Election Officer. If such insurance is not available, or if the IBT so elects, the IBT shall indemnify the Administrator, Investigations Officer, Election Officer and persons acting on their behalf from any liability (or costs incurred to defend against the imposition of liability) for conduct taken pursuant to this order. That indemnification shall not apply to conduct not taken pursuant to this order. In addition, the Administrator, the Investigations Officer, the Election Officer and any persons designated or hired by them to act on their behalf shall enjoy whatever exemptions from personal liability may exist under the law for court officers.

I. IBT LEGAL COUNSEL

14. During the term of office of the court-appointed officers, the IBT General President shall have the right to employ or retain legal counsel to provide consultation and representation to the IBT with respect to this litigation, to negotiate with the appropriate official and to challenge the decisions of the court-appointed officers, and may use union funds to pay for such legal consultation and representation. The Administrator's removal powers and authority over union

expenditures shall not apply to such legal consultation and representation.

J. NON-WAIVER

15. To the extent that such evidence would be otherwise admissible under the Federal Rules of Evidence, nothing herein shall be construed as a waiver by the United States of America or the United States Department of Labor of its right to offer proof of any allegation contained in the Complaint, Proposed Amended Complaint, declarations or memoranda filed in this action, in any subsequent proceeding which may lawfully be brought.

K. APPLICATION TO COURT

16. This Court shall retain jurisdiction to supervise the activities of the Administrator and to entertain any future applications by the Administrator or the parties. This Court shall have exclusive jurisdiction to decide any and all issues relating to the Administrator's actions or authority pursuant to this order. In reviewing actions of the Administrator, the Court shall apply the same standard of review applicable to review of final federal agency action under the Administrative Procedure Act.

L. FUTURE PRACTICES

17. The parties intend the provisions set forth herein to govern future IBT practices in those areas. To the extent the IBT wishes to make any changes, constitutional or otherwise, in those provisions, the IBT shall give prior written notice to the plaintiff, through the undersigned. If the plaintiff then objects to the proposed changes as inconsistent with the terms and objectives of this order, the change shall not occur; provided, however, that the IBT shall then have the right to seek

a determination from this Court, or, after the entry of judgment dismissing this action, from this Court or any other federal court of competent jurisdiction as to whether the proposed change is consistent with the terms and objectives set forth herein.

M. SCOPE OF ORDER

18. Except as provided by the terms of this order, nothing else herein shall be construed or interpreted as affecting or modifying: (a) the IBT Constitution; (b) the Bylaws and Constitution of any IBT affiliates; (c) the conduct and operation of the affairs of the IBT or any IBT-affiliated entity or any employee benefit fund as defined in ERISA or trust fund as defined by Section 302(c) of the Labor Management Relations Act, as amended; (d) the receipt of any compensation or benefits lawfully due or vested to any officer, member or employee of the IBT or any of its affiliates and affiliated benefit fund; or (e) the term of office of any elected or appointed IBT officer or any of the officers of any IBT-affiliated entities.

N. NON-ADMISSION CLAUSE

19. Nothing herein shall be construed as an admission by any of the individual union defendants of any wrongdoing or breach of any legal or fiduciary duty or obligation in the discharge of their duties as IBT officers and members of the IBT General Executive Board.

O. FUTURE ACTIONS

20. Nothing herein shall preclude the United States of America or the United States Department of Labor from taking any appropriate action in regard to any of the union defendants in reliance on federal laws, including an action or motion to require disgorgement of pension, severance or any other retirement benefits of any individual union officer

defendant on whom discipline is imposed pursuant to paragraph 12 above.

P. LIMITS OF ORDER

21. Nothing herein shall create or confer or is intended to create or confer, any enforceable right, claim or benefit on the part of any person or entity other than to the parties hereto and the court-appointed officers established herein. As to the undersigned defendants hereto, this order supersedes the order of the Court entered on June 28, 1988, as thereafter extended.

Q. EXECUTION

22. Each of the undersigned individual defendants has read this order and has had an opportunity to consult with counsel before signing the order.

March 14, 1989.

/s/

DAVID N. EDELSTEIN

United States District Judge

CONSENTED TO:

BENITO ROMANO
United States Attorney
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007
Attorney for Plaintiff United States of
America

By: /s/
RANDY M. MASTRO
Assistant United States Attorney

MUDGE ROSE GUTHRIE ALEXANDER
& FERDON
180 Maiden Lane
New York, New York 10038
Attorneys for Defendants IBT and its General
Executive Board

By: /s/
JED S. RAKOFF

JAMES T. GRADY, ESQ.
General Counsel
International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of
America, AFL-CIO
25 Louisiana Avenue, N.W.
Washington, D.C. 20001

By: /s/_____
JAMES T. GRADY, ESQUIRE

/s/_____
Defendant WILLIAM J. McCARTHY

Defendant WELDON MATHIS

/s/_____
Defendant JOSEPH TREROTOLA

/s/_____
Defendant JOSEPH W. MORGAN

Defendant EDWARD M. LAWSON

/s/_____
Defendant ARNOLD WEINMEISTER

/s/

Defendant DONALD PETERS

/s/

Defendant WALTER J. SHEA

/s/

Defendant HAROLD FRIEDMAN

/s/

Defendant JACK D. COX

Defendant DON L. WEST

/s/

Defendant MICHAEL J. RILEY

/s/

Defendant THEODORE COZZA

/s/

Defendant DANIEL LIGUROTIS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-v-

INTERNATIONAL BROTHERHOOD OF:
TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA, AFL-CIO, et al.,

Defendants.

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ORDER

88 CIV.

4486 (DNE)

WHEREAS the Consent Order herein dated and
filed March 14, 1989 (the "Consent Order") contains certain
typographical errors;

IT IS HEREBY ORDERED AND DECREED
that the Consent Order shall be amended as follows:

1. The letter "A" at page 13, line 7 of the
Consent Order shall be amended to read "C."

2. The words "the authority" at page 3, line 19 of
the Consent Order shall be deleted.

Dated: New York, New York
June 28, 1989

/s/_____
DAVID N. EDELSTEIN
United States District Judge

CONSENTED TO:

BENITO ROMANO
United States Attorney
Attorney for Plaintiff
United States of America

By: /s/_____
MARLA ALHADEFF
Assistant United States Attorney

MUDGE ROSE GUTHRIE ALEXANDER
& FERDON
Attorneys for Defendants IBT
and its General Executive Board

By: /s/_____
JED S. RAKOFF, ESQ.



No. 89-1602

Supreme Court, U.S.
FILED

MAY 17 1990

SPANISH
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, AFL-CIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES
IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WILLIAM KANTER
ROBERT M. LOEB
Attorneys

*Department of Justice
Washington, D.C. 20530
(202) 633-2217*

QUESTION PRESENTED

Whether the court of appeals correctly dismissed petitioner's appeals from orders that applied the terms of a decree to which petitioner had consented.



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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1602

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, AFL-CIO, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

OPINIONS BELOW

The orders of the court of appeals dismissing the appeals, Pet. App. 1a, 2a, are unreported. The order of the court of appeals denying the petition for rehearing and suggestion of rehearing en banc, Pet. App. 26a-27a, is unreported. The district court order of October 18, 1989, Pet. App. 3a-18a, is reported at 723 F. Supp. 203. Two other district court orders at issue, entered on October 18 and November 16, 1989, Pet. App. 19a-20a, 21a-25a, are unreported.

JURISDICTION

The orders of the court of appeals dismissing the appeals were entered on December 13, 1989. The order denying the

petition for rehearing and suggestion of rehearing en banc was entered on February 12, 1990. The petition for a writ of certiorari was filed on April 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1988, the United States filed this civil action seeking relief against petitioner under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* The complaint alleged that the Teamsters union had long been under the control of organized crime, and it sought equitable relief to rid the union of such control. Compl. at 109-111.

On the eve of trial, the parties agreed to a consent decree, which the district court entered as an order of the court. Pet. App. 28a-56a. The consent decree permanently enjoins petitioner's officers, members, and employees from engaging in racketeering activity and from knowingly associating with organized crime families generally, and with La Cosa Nostra families in particular. Pet. App. 33a. The consent decree further provides that the court will appoint three officers: an Independent Administrator, an Investigations Officer, and an Election Officer. *Ibid.* The Administrator is mandated to discipline corrupt officials, appoint temporary trustees to run the affairs of affiliated entities, and oversee the activities of the other two officers. Pet. App. 34a. The Investigations Officer is commissioned to investigate disciplinary charges and institute trusteeship proceedings. The Election Officer is authorized to supervise the balloting process and certify elections. Pet. App. 41a.

The consent decree provides for ongoing district court jurisdiction "to supervise the activities of the Administrator and to entertain any future applications by the Administrator or the parties." Pet. App. 49a. At the same time,

the decree provides that "[n]othing herein shall be construed as authorizing the parties or the Court-appointed officers to modify, change or amend the terms of this Order." Pet. App. 44a. The decree provides for entry of final judgment "[u]pon satisfactory completion and implementation of the terms and conditions of this order," at which time the district court "shall entertain a joint motion of the parties hereto for entry of judgment dismissing the action with prejudice." Pet. App. 29a.

2. In October 1989, petitioner applied to the district court for an order forbidding certain actions by the Election Officer. Petitioner sought, *inter alia*, to prevent the Election Officer from monitoring the local elections leading up to the 1991 election of petitioner's International officers. Pet. App. 5a. Petitioner also objected to the Election Officer's having any staff, and to the creation of a \$100,000 operating fund of *federal* moneys from which the three court officers could be paid pending reimbursement by the union. Pet. App. 12a-16a. Petitioner reserved the right to refuse to pay for any activities it deemed to be outside the scope of the consent decree. Pet. App. 5a.

The district court rejected petitioner's arguments as flatly inconsistent with the express terms of the consent decree. Observing that the "purpose of the Consent Decree is to rid the union of the hideous cloud of corruption that envelops it," and advising the parties to "adhere by the letter of the Consent Decree," the district court urged that "the Court Officers must not be hampered in the performance of their obligatory duties." Pet. App. 18a.

Accordingly, the district court approved the Election Officer's supervision of the entire 1991 election, and not just the final vote for the International officers. Pet. App. 8a-10a. The district court agreed with petitioner that it "need only look to the plain language of the Consent Decree to interpret its meaning." Pet. App. 8a n.2. But "following

[petitioner's] argument that the Consent Decree must be interpreted according to its terms," the district court "f[ou]nd that the term '1991 election' * * * was intended to encompass the entire electoral process which will culminate in the 1991 election for International Officers." Pet. App. 9a-10a.

The court further found that the Election Officer's broad powers to "supervise" the 1991 election included the powers to promulgate election rules and procedures, and to oversee, coordinate, and direct the nomination and election process. Pet. App. 7a-8a, 10a. In light of the Election Officer's duty to supervise more than 660 local elections involving 1.7 million voters, Pet. App. 12a-13a, and the decree's explicit provision for hiring and compensating the Administrator, Investigations Officer, Election Officer, "and any designee or persons hired by them," Pet. App. 43a, the district court found the Election Officer's staffing and funding requests to be entirely consistent with the terms of the decree. Pet. App. 12a-17a.

3. In November 1989, the Administrator learned that petitioner planned to publish the *International Teamster* magazine quarterly, rather than monthly, ostensibly as a cost-cutting measure. The Administrator thereupon applied to the district court for an order requiring petitioner to publish his reports on a monthly basis. Pet. App. 21a-24a. The Administrator simultaneously sought to clarify petitioner's duty to publish the district court's orders. Pet. App. 22a.

The district court agreed with the Administrator's application on both points. First, observing that the consent decree specifically provides that the "Administrator shall have the authority to distribute materials at reasonable times to the membership of the [union] about the Administrator's activities," and that he "shall have the authority to publish a report in each issue of the *International Teamster* concerning the activities of the Administrator, Investigations

Officer and Election Officer,” Pet. App. 42a, the district court reasoned that the consent decree required monthly reports to petitioner’s members. Pet. App. 22a-24a. But the district court did not require petitioner to continue monthly publication of the *International Teamster*. To the contrary, it ruled that the required reports “may be made either (a) by continued monthly publication of the *International Teamster* or (b) by monthly mailing of a report by the Independent Administrator to [petitioner’s] rank and file as a whole at [petitioner’s] expense.” Pet. App. 24a. See Pet. App. 42a (provision of consent decree that “[t]he reasonable cost of distribution of these materials shall be borne by the [union]”).

Second, the district court held that petitioner is required to distribute the court’s orders and opinions intact, without commentary, editing, or embellishment. Pet. App. 24a. The court later clarified that its order only precluded petitioner from distributing a marked up version of the court’s order (*i.e.*, with marginal notes), and that petitioner is completely free to comment on and criticize the court’s orders in its magazine. D. Ct. R. 835. See Pet. 11 n.17.

4. Petitioner sought review of the district court’s orders in the Second Circuit. The United States moved to dismiss the appeals on the ground that the district court’s orders merely applied, and in no way altered, the terms of the consent decree, and that the district court’s action was thus not appealable—regardless of petitioner’s characterization of that action. With respect to the order upholding the Election Officer’s powers, the government contended:

When it agreed to the Consent Order, [petitioner] “waived its objections to the terms of the order.” Thus, [petitioner] waived its right to litigate—or to contest on appeal—the substance of the terms of the Consent Order. The Court should dismiss this appeal for lack of jurisdiction because the appeal, in essence, directly

challenges the very Election Officer powers [petitioner] agreed to in the Consent Order.

* * * * *

If consent agreements truly are to serve the purpose of reducing litigation, the parties should not be able to generate appeals challenging the substance of the agreement by obstinate disagreement with the general principles to which they previously consented. [Petitioner] has done nothing more than attack the very agreement it entered into regarding the Election Officer's supervisory powers. Accordingly, the appeal should be dismissed.

89-6252 Gov't C.A. Mem. at 8-10. Similarly, with respect to the order discussing the frequency and content of reports to petitioner's members, the government maintained:

* * * [Petitioner] seeks to renege on its agreement to allow the Administrator to report to the union membership * * *

* * * [This order] does not raise an issue of interpretation sufficient to invoke appellate jurisdiction. [Petitioner] agreed that the Administrator could report to the membership in each issue of the *International Teamster* and, at the time the Consent Order was entered, [petitioner] published the magazine monthly. Considering the context surrounding entry of the Consent Order, the district court appropriately concluded, in the course of supervising this complex Consent Order, that the Administrator should have a channel open to distribute reports at least monthly. * * *

When [petitioner] agreed to the Consent Order, [it] "waived its objections to the terms of the order." Thus, [petitioner] has waived its right to litigate — or to contest on appeal — the basic power conferred on the Administrator to report to the membership under Con-

sent Order ¶ 12(E). The district court did no more than confirm that stipulation. Accordingly, the Court should dismiss this appeal for lack of jurisdiction because it raises no substantial interpretive issue under the Consent Order.

89-6254 Gov't C.A. Mem. at 9-10 (citations omitted).

Petitioner opposed the government's motions. It insisted that the district court had recognized authority in the court-appointed officers in excess of that conferred by the consent decree, and argued that jurisdiction existed under 28 U.S.C. 1291 and 28 U.S.C. 1292(a)(1). At no point, however, did petitioner argue that dismissal was an inappropriate disposition if the court of appeals rejected petitioner's contentions. See 89-6252 Pet. C.A. Mem. at 11; 89-6254 Pet. C.A. Mem. at 10.

On December 13, 1989, the Second Circuit issued two orders, both of which stated that the panel, having considered the government's motion to dismiss the appeal, "hereby [] grant[s]" that motion. Pet. App. 1a-2a. On February 12, 1989, the Second Circuit denied petitioner's petition for rehearing and suggestion of rehearing en banc. Pet. App. 26a-27a.

ARGUMENT

Petitioner "do[es] not contend that *every* ruling construing the terms of a consent decree is invariably entitled to appellate review." Pet. 13-14. Indeed, it could not. For it is well settled that "a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause." *Swift & Co. v. United States*, 276 U.S. 311, 324 (1928) (quoting *Nashville, Chattanooga & St. Louis Ry. v. United States*, 113 U.S. 261, 266 (1885)). See *United States v. Babbitt*, 104 U.S. 767, 768 (1881) ("The consent to the judgment below

was in law a waiver of the error now complained of.”); *Pacific R.R. v. Ketchum*, 101 U.S. 289, 295 (1879) (“If, when the case gets here, it appears that the decree appealed from was assented to by the appellant, we cannot consider any errors that may be assigned which were in law waived by the consent * * *.”); *Cohen v. Virginia Elec. & Power Co.*, 788 F.2d 247, 249 (4th Cir. 1986); *White v. Commissioner*, 776 F.2d 976, 977 (11th Cir. 1985) (collecting cases). See also *United States v. Procter & Gamble*, 356 U.S. 677, 680 (1958) (“[T]he familiar rule [is] that a plaintiff who has voluntarily dismissed his complaint may not sue out a writ of error.”).

In this case, the district court found that the powers opposed by petitioner and asserted by the court-appointed officers were authorized by the express terms of the consent decree. Accordingly, to the extent that the court of appeals agreed with these determinations by the district court, it properly dismissed the appeals, because petitioner had waived its objections to the exercise of those powers by acceding to the consent decree.

That the court of appeals might also have summarily affirmed the district court on the merits is immaterial in this circumstance. On review of the terms of a consent decree, no difference of substance exists between (a) dismissing the appeal because the district court correctly determined that the party had consented to the order (and therefore waived an appeal); and (b) affirming the district court’s underlying determination that the party consented to the order. In either event, the decision below represents the court of appeals’ determination that, in the circumstances presented, petitioner consented to the orders entered by the district court and cannot now be heard to impeach them. Nor is there doubt that waiver underlies the court of appeals’ dismissal, because the government urged precisely that ground in its motions to dismiss.

In sum, the court of appeals' decision correctly upholds the parties' consent decree settling serious racketeering charges against petitioner. The parties' fact-bound dispute over the meaning of that agreement does not merit review by this Court.)

1. Regardless of whether an order is otherwise appealable as a final decision under 28 U.S.C. 1291, an appealable collateral order under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), or an interlocutory order under 28 U.S.C. 1292(a), a party's agreement to that order waives appellate review of the matters to which consent has been given.¹ *Swift & Co. v. United States*, 276 U.S. at 324; *Nashville, Chattanooga & St. Louis Ry. v. United States*, 113 U.S. at 266; *United States v. Babbitt*, 104 U.S. at 768; *Pacific R.R. v. Ketchum*, 101 U.S. at 295; *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 889, 893 (9th Cir. 1986) ("dismiss[ing] Wickland's appeal on this claim for lack of jurisdiction" from a "final judgment" on a voluntarily-dismissed claim "because it is not an involuntary adverse judgment"); *Cohen v. Virginia Elec. & Power Co.*, 788 F.2d at 249-250 (dismissing appeal from consent judgment notwithstanding argument that consent went only to amount of fees awarded and not to underlying determination of liability, because "the plain language of the consent order makes clear that the parties are acquiescing in the award of attorneys fees"); *White v. Commissioner*, 776 F.2d at 977-978 (dismissing appeal from stipulated judgment

¹ Of course, a party may obtain appellate court review of the contentions that no consent was given (e.g., the supposed consent was the product of mistake or fraud), and that the court lacked subject matter jurisdiction. *Swift & Co. v. United States*, 276 U.S. at 324; *Pacific R.R. v. Ketchum*, 101 U.S. at 295; *Shores v. Sklar*, 885 F.2d 760, 762 (11th Cir. 1989); *White v. Commissioner*, 776 F.2d at 977-978; *Coughlin v. Regan*, 768 F.2d 468, 469-470 (1st Cir. 1985); *United States v. Bechtel Corp.*, 648 F.2d 660, 663 (9th Cir.), cert. denied, 454 U.S. 1083 (1981).

in which taxpayers consented to reduction in amount of deficiency); *Haitian Refugee Center v. Civiletti*, 614 F.2d 92, 93 (5th Cir. 1980) (per curiam) (dismissing appeal by government from consent order entering interlocutory injunction, despite government's argument that trial court proceedings were taking longer than anticipated at time consent was given).

Petitioner does not disagree that consent to a judgment waives appellate review of the merits. Indeed, the cases cited in the petition, Pet. 16, 21, including those of the Second Circuit, Pet. 15 n.24, hold only that plenary appellate review of an order relating to a consent decree is proper when the order is one to which no consent has in fact been given. See, e.g., *United States v. Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1082 (3d Cir. 1987) (district court's order, "[w]hether viewed as an indefinite stay or an amendment of the Consent Decree," is "final and appealable" under 28 U.S.C. 1291); *United States v. Western Elec. Co.*, 777 F.2d 23, 24, 27, 29 (D.C. Cir. 1985) (dicta) (a district court order disposing of a "Baby Bell's" request to waive restrictions in the AT&T consent decree and enter a new line of business would be "subject to appeal as a final decision" under 28 U.S.C. 1291 and 1292(a)(1)); *Sperry Corp. v. Minneapolis*, 680 F.2d 1234, 1236-1237 (8th Cir. 1982) (appellant, which was not even a party to the consent decree, could appeal "denial of a motion to modify an injunction" entered in a separate lawsuit under 28 U.S.C. 1292(a)(1)); *Roberts v. St. Regis Paper Co.*, 653 F.2d 166, 170 (5th Cir. 1981) (order enforcing consent decree that had allegedly expired five years earlier constituted an appealable order under 28 U.S.C. 1292(a)(1)). The parties therefore agree that unconsented-to orders that are otherwise appealable are reviewable on the merits, while consented-to orders are not.²

² Although petitioner refers to the district court's orders as interpreting the consent decree, and cites a series of appellate cases where

2. In this case, the court of appeals correctly determined that petitioner had consented to the district court's orders (and thereby waived appellate review of the merits of those orders) by its agreement to the consent decree.

A. Petitioner renews its contention—rejected explicitly by the district court and implicitly by the court of appeals—that the Election Officer's duty to “supervise the IBT election . . . to be conducted in 1991,” Pet. 5, limits him to certifying the final vote for the International officers in 1991. Pet. 5-6, 16-17.

Petitioner's edited version of the consent decree, however, omits the operative language defining the “election” to be supervised: “The Election Officer shall supervise the IBT election *described above* to be conducted in 1991.” Pet. App. 41a (emphasis added). The “IBT election described above” includes not only the election of the International officers, but also the election of union delegates, who are nominated and elected by the rank and file. Pet. App. 39a. The description further includes the union delegates' nomination of the International officer candidates. Pet. App. 40a. Thus, the express terms of the consent decree contradict petitioner's limiting construction, and the district court order merely reiterated the unambiguous terms of the decree.

The plain language of the consent decree likewise forecloses petitioner's funding and staffing arguments. Pet. 8. The decree expressly provides for the court-appointed

the courts without discussion reviewed the “interpretation” of a consent decree, see Pet. 14-15, the terminology is not determinative. Appellate review of the merits rests on whether the appellant consented to the order appealed from—or conversely, whether the order alters the legal relationship contemplated by the parties. See *Motorola, Inc. v. Computer Displays Int'l, Inc.*, 739 F.2d 1149, 1155 (7th Cir. 1984). See also *United States v. Western Elec. Co.*, 777 F.2d at 29 (appealability does not turn on what the court's order is called but on the substantive consequences of that order).

officers to have staffs, and it specifically requires the union to pay for compensation and costs of the officers and their staffs. Pet. App. 43a. The district court once again merely restated the terms of the consent decree. The only matter outside the pure terms of the decree was the offer by the United States to advance \$100,000 for the court-appointed officers to draw upon, an amount that would then be subject to reimbursement by petitioner if the payments were proper and reasonable. Pet. App. 14a-17a. The district court's approval of this fund can hardly be characterized as an adverse modification—if indeed it is a modification in any sense—since the consent decree obligates *petitioner* to make the payments in the first instance. Pet. App. 43a.

B. Petitioner also renews its contention—again rejected explicitly by the district court and implicitly by the court of appeals—that monthly reports to the union membership, which reports are to include the district court's opinions, modified the consent decree and violated petitioner's rights under the First Amendment. Pet. 19-20.

Although petitioner's First Amendment rhetoric about being forced to publish speech with which it disagrees is engaging, the reporting requirements are plainly warranted under the express terms of the consent decree. Petitioner explicitly agreed in the decree to publish the reports of the court-appointed Administrator in its union magazine, the *International Teamster*. Pet. App. 42a. Since the *International Teamster* was published monthly at the time the parties entered into the decree (and had been so published for the preceding five years), it was perfectly consonant with the decree to construe as authorizing monthly reports the Administrator's authority to report to the membership "at 'reasonable' times" and "in each issue of the *International Teamster*." What is more, those monthly reports need not even appear in the *International Teamster*. Petitioner can choose to publish its magazine quarterly, as long as it

underwrites the monthly reports to union members contemplated in the consent decree. Pet. App. 24a.

The consent decree also expressly authorizes the Administrator to report on the activities of the "Administrator, Investigations Officer and Election Officer." Pet. App. 42a. Nowhere does the consent decree limit the reports to matters with which petitioner agrees. Since the court proceedings relate to the activities of the court-appointed officers, it is well within the express terms of the consent decree to require the union to publish the district court's decisions. Once more, the district court simply upheld and applied the terms of the decree.

3. The court of appeals' decision to dismiss petitioner's appeals for lack of jurisdiction, rather than to affirm summarily the district court's orders on the merits, was not questioned by petitioner below and is a matter of form not worthy of this Court's attention.

As illustrated by the cases cited at pp. 9-10, *supra*, the courts of appeals frequently dismiss appeals for want of jurisdiction, rather than summarily affirm on the merits, when, as here, the only question on appeal is whether an order is within the scope of a consent decree. In such an appeal, there is no practical difference between a *dismissal* (based on the party's consent and waiver of appeal) and a summary affirmance (based on the party's consent to the order from which the appeal is taken). In both instances, the court of appeals' decision represents its considered determination that the appellant consented to the orders entered by the district court and cannot thereafter challenge them on the merits.

In this case, the government's memoranda and the court of appeals' disposition on the basis of those memoranda leave no doubt that waiver is the basis for the dismissal of petitioner's appeals. In its motions to dismiss, the govern-

ment urged dismissal on precisely that ground. See pp. 5-7, *supra*. And by dismissing the appeals, the Second Circuit evidenced its agreement with the government (and the district court) that the orders at issue here were well within the scope of the decree to which petitioner had consented. For that reason, the dismissals of the appeals are in substance equivalent to summary affirmances on the merits.

Finally, petitioner never argued below that if the court of appeals disagreed with petitioner's contention that the district court's orders imposed conditions not in the consent decree, it should not dismiss the appeals but rather should summarily affirm. Instead, petitioner staked its entire argument on the premise that the district court's orders exceeded the terms of the consent decree, and omitted any discussion of the appropriate disposition if the Second Circuit rejected that premise. It is too late for petitioner to fault the court of appeals for not adopting an argument that it failed to make.

* * * * *

In sum, 28 U.S.C. 1291 (authorizing appeals from final decisions) does not help petitioner here because petitioner's consent to the decree waives review of the merits of that decree. Similarly, 28 U.S.C. 1292(a)(1), which authorizes appeals of interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions," does not help petitioner because the assertion of jurisdiction under that Section on the basis of a modification of an injunctive order requires the court of appeals to inquire whether an injunction has in fact been modified. See, *e.g.*, *Thompson v. Enomoto*, 815 F.2d 1323, 1326-1327 (9th Cir. 1987); *Bradley v. Milliken*, 772 F.2d 266, 270-271 (6th Cir. 1985); *Motorola, Inc. v. Computer Displays Int'l, Inc.*, 739 F.2d 1149,

1154-1155 (7th Cir. 1984). The existence of a modification is a jurisdictional fact that is condition precedent to appellate review. See 28 U.S.C. 1292(a)(1); *Thompson v. Enomoto*, 815 F.2d at 1326-1327; *Motorola, Inc. v. Computer Displays Int'l, Inc.*, 739 F.2d at 1155; *Hoots v. Pennsylvania*, 587 F.2d 1340, 1348 (3d Cir. 1978). See also *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981). Cf. *FW/PBS, Inc. v. Dallas*, 110 S. Ct. 596, 607 (1990) (plurality opinion) (appellate court must inquire into its jurisdiction over an appeal); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (same). No such modification has been found here.

At bottom, the only dispute between the parties is whether or not the district court merely considered and determined matters to which petitioner had already consented. The court of appeals' fact-bound application of well-settled law does not merit this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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MAY 1990

IN THE
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for the Second Circuit

PETITIONER'S REPLY BRIEF

1. The Solicitor General, departing sharply from the position taken by the government below, agrees that "plenary appellate review of an order relating to a consent decree is proper when the order is one to which no consent has in fact been given." Br. in Opp. 10. He nonetheless argues that the Court of Appeals lacked jurisdiction in this case because, in his view, the IBT "consented to the orders entered by the district court and cannot now be heard to impeach them." *Id.* at 8.

The Solicitor General does not mean quite what those words say, for there is no doubt that the IBT vigorously contested the orders at issue and never consented to them. As he sees it, however, a reasonable interpretation of a consent decree—even if genuinely disputed and hotly contested—does not give rise to an “unconsented-to” (*id.* at 10) reviewable order, because agreement to the underlying decree necessarily implies consent to reasonable interpretations of the decree. He accordingly argues in this case that the IBT “consented to the district court’s [interpretive] orders (and thereby waived appellate review of the merits of those orders) by its agreement to the [original] consent decree.” *Id.* at 11.

Under the Solicitor General’s circular reasoning, a court of appeals has no power to decide whether the interpretation of a consent decree is *correct* until it first determines as a “jurisdictional fact” (*id.* at 15) that the interpretation is *incorrect*. Only then, in his view, can the court of appeals properly find that the interpretation was “unconsented-to” and therefore reviewable. But that puts the cart before the horse. The issue at the jurisdictional stage is whether there is a genuine dispute over the district court’s interpretation. The correctness of the interpretation is for consideration on the merits. By inverting the inquiry—in effect requiring a court of appeals to *dispose* of the merits before it can *reach* the merits—the Solicitor General would erect an unprecedented and unworkable obstacle to the exercise of appellate jurisdiction.

Not one of the cases on which the Solicitor General relies supports his bizarre theory. He states that “the courts of appeals frequently dismiss appeals for lack of jurisdiction . . . when, as here, the only question on appeal is whether an order is within the scope of a consent decree.” *Id.* at 13. But the decisions he cites involved challenges, not to an interpretation of a consent decree, but to the decree itself. Thus, appeals were dismissed

where parties sought to set aside a consent decree, *Swift & Co. v. United States*, 276 U.S. 311 (1928), to relitigate an issue resolved in a consent judgment, *Nashville, Chattanooga & St. Louis Ry. v. United States*, 113 U.S. 261 (1885), or to challenge on appeal an order stipulated or agreed upon in the court below, *United States v. Babbit*, 104 U.S. 767 (1881); *Pacific R.R. v. Ketchum*, 101 U.S. 289 (1879); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887 (9th Cir. 1986); *Cohen v. Virginia Elec. & Power Co.*, 788 F.2d 247 (4th Cir. 1986); *White v. Commissioner*, 776 F.2d 976 (11th Cir. 1985); *Haitian Refugee Center v. Civiletti*, 614 F.2d 92 (5th Cir. 1980).

The IBT has never challenged the consent order in this case. On the contrary, it seeks only to vindicate the terms of that order. Its argument—the merits of which the Court of Appeals refused to hear—is that the district court's purported interpretation of the consent order is incompatible with the terms of the order and with the parties' purposes. Until the decision below, no court had doubted that a district court's genuinely disputed interpretation of a consent decree was reviewable on appeal. See the cases cited at Pet. 14-16. Indeed, as the D.C. Circuit reiterated only a few weeks ago, it has "repeatedly held that the construction of a consent decree . . . is subject to *de novo* appellate review." *United States v. Western Electric Co.*, No. 87-5388, slip op. at 23 (D.C. Cir. Apr. 3, 1990) (WESTLAW, CTADC database).

The rule is straightforward and easy to apply: while a party's consent to an order bars an appeal of that order, it does not bar an appeal of a contested interpretation of the order. The correctness of the interpretation goes to the merits of the district court's decision, not to the jurisdiction of the court of appeals. The Solicitor General's theory would make every such appeal jurisdictionally top-heavy, requiring the court of appeals to inquire dispositively into the merits in order to determine

its jurisdiction to consider the merits. That approach would give rise to a new category of motion practice in the courts of appeals, imposing on those courts threshold burdens that are best handled after full briefing and argument on the merits. It would also have the undesirable practical effect of insulating from plenary appellate review many district court orders, like the ones appealed from here, whose fidelity to the terms of an underlying consent decree is subject to legitimate question.

If there is to be so drastic a change in the way courts of appeals handle the review of such orders, the change should be made, not by the Second Circuit in an unexplained order of dismissal or by the Solicitor General straining to defend that dismissal, but only by this Court after full consideration of the consequences.

2. If there were reason to doubt the genuineness of a dispute over an order interpreting a consent decree—if, in other words, the appellant has no colorable argument on the merits—one might fairly conclude that the appeal should be dismissed as a mere pretext for challenging the underlying decree. Even that principle must be applied with caution, because every district court interpretation purports to apply the plain terms of a consent decree, and the prevailing party will always insist, as the Solicitor General does here, that the contested order “merely reiterated the unambiguous terms of the decree.” Br. in Opp. 11. The focus should be not on the strength of the prevailing party’s belief in his cause but on the genuineness of the controversy. If the appeal presents a non-frivolous issue, it should be decided on the merits.

The decision below cannot be squared with such an approach. First, contrary to the Solicitor General’s assumption, it is implausible to suppose that the Court of Appeals based its dismissal orders on a consideration of the merits. When the government moved to dismiss the IBT’s appeals, long before briefs on the merits were to be filed, it made three arguments: (1) the orders appealed

from were non-final; (2) the orders could not be reviewed under the collateral order doctrine; (3) the Court of Appeals should in any event decline jurisdiction by analogy to this Court's summary dismissal of appeals for lack of a substantial federal question. See Gov't C.A. Mem., Nov. 22, 1989, at 5-10; Gov't C.A. Mem., Dec. 1, 1989, at 6-10. It was only in connection with the third claim, essentially an appellate afterthought, that the government used the language to which the Solicitor General points in support of his assertion that "waiver underlies the court of appeals' dismissal." Br. in Opp. 8. Divining the basis of the Second Circuit's decision from the arguments presented to it is at best a speculative exercise. To conclude, as the Solicitor General has, that the Second Circuit based its decision on a subsidiary aspect of the least prominent argument urged upon it exceeds any reasonable limits on such speculation.

Second, while the Solicitor General understandably believes that the government has the better of the argument on the merits of the district court's interpretation, not even he goes so far as to suggest that the IBT's interpretive position is frivolous. Although the merits were never briefed before the Court of Appeals, even a cursory review of the issues makes clear that the IBT's claims are both genuine and substantial.

For example, the Consent Order, by its terms, authorizes the Election Officer to "supervise the IBT election described above to be conducted in 1991." Pet. App. 41a. The Solicitor General argues that the phrase "described above" embraces not only the 1991 International election but also a series of local delegate elections to be conducted beginning in 1990. Br. in Opp. 11. He considers the text of the decree "unambiguous" in this respect. *Id.* But the relevant language uses the word "election," not "elections," and it contains the restrictive clause "to be conducted in 1991." The more natural reading of the text is that it confers supervisory powers on the Election

Officer *only* as to the 1991 International election and *not* as to the 1990 delegate elections that are also “described above.” If the clause means what the Solicitor General believes it means, there would have been no purpose in adding the limiting phrase “to be conducted in 1991.”

In support of its textual argument, the IBT submitted to the district court sworn affidavits from the primary negotiators of the Consent Order attesting to the parties’ intention not to consent to the Election Officer’s supervision of delegate elections at the union local level. These affidavits included prior drafts of the Consent Order showing that all proposals that would have conferred such powers on the Election Officer had been intentionally omitted from the final version of the Consent Order. See Pet. 6-7 & n.7.

Similarly, the IBT agreed in the Consent Order that the “Administrator shall have the authority to distribute materials at reasonable times to the membership of the [union] about the Administrator’s activities” and that he “shall have the authority to publish a report in each issue of the *International Teamster* concerning the activities of the Administrator, Investigations Officer and Election Officer.” Pet. App. 42a. No plain reading of this language can lead to the conclusion that the IBT consented to devote substantial portions of its magazine to the publication of the district court’s opinions. The Solicitor General contends, however, that the publication order was issued in response to a request by the Administrator and thus falls “well within” the IBT’s agreed-upon obligation to publish the Administrator’s reports on the activities of the court officers. Br. in Opp. 4-5. The record refutes the premise of that argument.

The order requiring publication of the court’s opinions specifies that it arose from a “hearing . . . held to clarify the orders of this Court made regarding the publication of this Court’s opinions and other related matters (the ‘publication hearing’).” Pet. App. 22a. The transcript

of the so-called "publication hearing" contains the following statement of the Independent Administrator to the district judge: "In court here on the 13th you indicated you wanted your opinions published in full. I have not been aware prior to that time that that was your . . . Honor's wish." Tr. Nov. 15, 1989, at 2. Obviously the publication order was not, as the Solicitor General contends, a response to an initiative of the Administrator, since by the Administrator's own admission, it came as a surprise to him.

This fact is confirmed by the district court's acknowledgment in open court on November 13 that the Administrator's application concerning the publication schedule of the IBT magazine did not include any request that the IBT publish the court's opinions. Tr. Nov. 13, 1989, at 29. Unprompted by the Administrator, the district judge *sua sponte* ordered the IBT to distribute the court's opinions on a monthly basis (*id.* at 40):

What I'm concerned about is that this court's proceedings and how it arrives at its decision be made known to every member of this class, and I insist upon it. And so I do not reserve on this point at all. The membership will be given distributions every month, including my dispositions, not characterizations of my opinions, but the opinions in haec verba. That's an order.

The record therefore reveals that the publication order has no anchor at all in the text of the Consent Order. The Solicitor General's suggestion that it arose from a request by the Administrator, submitted "simultaneously" with his application concerning the publication schedule of the IBT magazine (Br. in Opp. 4), is flatly wrong.

We believe that the IBT has by far the better of the argument on these interpretive issues. But one need not endorse the IBT's view of the decree to recognize that its claims are substantial ones of which it was entitled

to appellate review on the merits. Claims such as these should not be treated as falling outside the scope of appellate review simply because they challenge district court rulings on the ground that they exceed the scope of a consent decree.

3. The petition presents an important issue of principle, not a "fact-bound dispute over the meaning of [the consent] agreement." Br. in Opp. 9. The Solicitor General obviously finds it more comfortable to embrace the merits of the district court's interpretation than to defend the appropriateness of the Court of Appeals' dismissal of the IBT's appeals. His solution is to try converting the case into a routine disagreement over how best to read a consent decree.

Had the Court of Appeals addressed the merits of the appeals, perhaps all that would remain is a "fact-bound" dispute unworthy of this Court's attention. But the Court of Appeals' dismissal of the appeals was not a decision on the merits; it was a *refusal* to decide the merits. At this stage, therefore, the question is not whether this Court should review the correctness of the district court's orders but whether the IBT is entitled to such review in the Court of Appeals, whose jurisdiction is mandatory, not discretionary.

This Court should grant review to consider the circumstances under which a party may obtain appellate review of a purported interpretation of a consent decree. The Second Circuit's disposition, even as explicated by the Solicitor General, would expose such a party to the risk that it may be forced, on pain of contempt, to take difficult and costly actions, to which it does not believe it has consented, without a meaningful opportunity for appellate review. That novel principle warrants plenary consideration by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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